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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

70-13

No. 709

WINFIELD DUNN, Governor of the State of Tennessee; DAVID M. PACK, Attorney General of the State of Tennessee; JOE C. CARR, Secretary of State of the State of Tennessee; SHIRLEY G. HASSSLER, Coordinator of Elections of the State of Tennessee; GEORGE C. THOMAS, Chairman of the State Board of Elections; LYITTLE LANDERS and JAMES E. HARPSTER, Members of the State Board of Elections; THOMAS W. JARRELL, Chairman of Davidson County Election Commission; ALBERT H. THOMAS, IMDGENE MUSE, J. GRANSTAFF DALE, and JOHN H. HENDERSON, Members of the Davidson County Board of Elections; and MARY P. FERRELL, Registrar-at-Large of Davidson County, State of Tennessee,
Appellants,

vs.

JAMES F. BLUMSTEIN,
Appellee.

On Appeal from the Three Judge United States District Court for the Middle District of Tennessee, Nashville Division

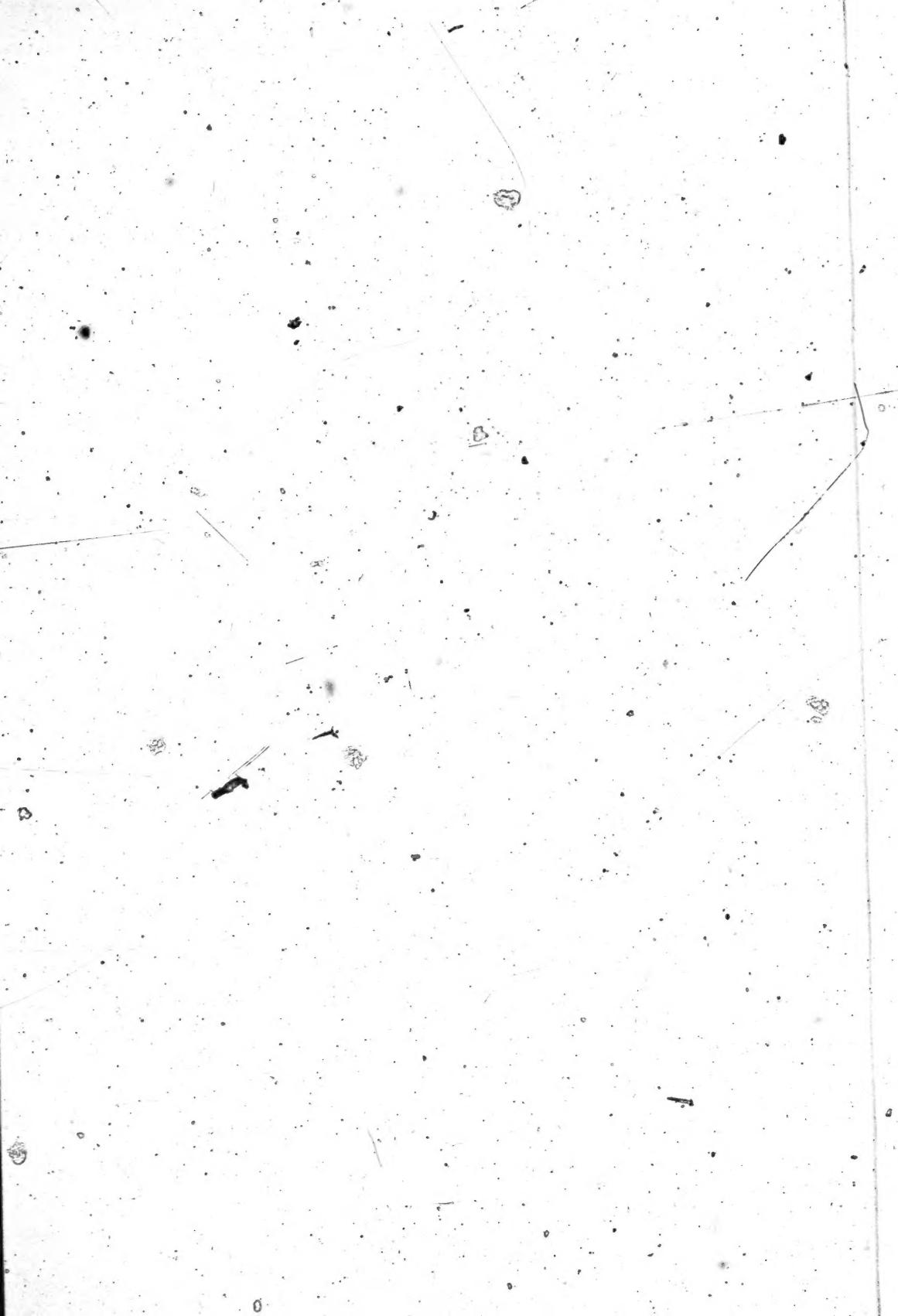
APPELLEE'S BRIEF

JAMES F. BLUMSTEIN
Appellee Pro Se
Vanderbilt Law School
Nashville, Tennessee 37203

Of Counsel

CHARLES MORGAN, JR.
NORMAN SIEGEL
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION, INC.
5 Forsythe Street, N. W.
Atlanta, Georgia 30303
JERRY P. BLACK, JR.
4517 Harpeth Hills Drive
Nashville, Tennessee 37215

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APPELLEE'S BRIEF

QUESTIONS PRESENTED

1. Whether Tennessee's durational residency requirements for voting infringe fundamental rights or involve a suspect classification, triggering strict review under equal protection.
2. Whether Tennessee's durational residency requirements for voting are necessary to promote a compelling state interest under strict equal protection review.

3. Whether Tennessee's durational residency requirements for voting violate the traditional standard of equal protection if the compelling state interest test is inapplicable.
4. Whether Tennessee's durational residency requirements for voting violate procedural due process.
5. Whether Tennessee's durational residency requirements for voting violate the substantive guarantees of due process.

STATEMENT OF THE CASE

Appellee moved to Nashville, Tennessee, on June 12, 1970, and moved into his present apartment on June 19, 1970. He is under contract of employment as Assistant Professor of Law at Vanderbilt University School of Law. On July 9-10, 1970, appellee took the Tennessee Bar Examination, and was admitted to practice before the Supreme Court of Tennessee on September 3, 1970. There is no question that he is a bona fide resident of the State of Tennessee, and the District Court so found.

On July 1, 1970, appellee presented himself at the office of the Davidson County Registrar-at-Large, Mary P. Ferrell, and sought to register to vote for the August 6, 1970 primary and general election and the November, 1970, general election. He explained that he was a resident of Nashville, Tennessee, but that he had not been a resident of Davidson County for three months or of the State of Tennessee for one year. Mrs. Ferrell found appellee ineligible to register and appellee appealed her decision pursuant to T.C.A., § 2-319 to the Davidson County Election Commission. On July 14, 1970, appellee appeared before the county election commission in its July meeting. He requested that he be allowed to show his integrity and his competence to exercise the franchise intelligently. He

asked that the commission read the statute as a guide but subject to a reasonableness interpretation which would allow admission of evidence to rebut the presumptions of incompetence and fraud. The county commission, by a 5-0 vote, ruled any showing of competence or integrity irrelevant, holding that the waiting period was a mandatory, non-waivable precondition to the exercise of the franchise. Under Tennessee law, no further administrative remedies were available to appellee.

On July 17, 1970, three days after the earliest time he could have exhausted his administrative remedies, appellee brought suit in his own behalf, and on behalf of all others similarly situated, for declaratory and injunctive relief, challenging the constitutional validity of Tennessee's three month in-county and one year in-state durational residency requirement for voting. On July 30, 1970, a three-judge United States District Court heard appellee's motion for a preliminary injunction. From the bench, the Court denied this motion on the ground that it was too close to the August 6th election and intervention by the Court at that time would be improvident. Appellee moved that he be allowed to cast a provisional ballot, but this motion was denied. Nevertheless, appellee, on election day in August, went to his polling place, filled out a ballot in the presence of the election officials, had it sealed and notarized, and placed it in the safe of the clerk of the District Court, where presumably it still remains.

On August 31, 1970, the District Court rendered its opinion, invalidating both the one year statewide and three month county waiting periods as violations of equal protection under the fourteenth amendment. On September 9, 1970, an order was entered, guaranteeing all new residents in Tennessee the right to register the same as all other bona fide Tennesseans otherwise qualified. The decision of the District Court did not invalidate the 30 day period between the close of registration and election

day, holding that this time was sufficient to achieve the various administrative chores attendant upon an election. The November, 1970, elections were held under the terms of the District Court's Order; although complete data are unavailable, it has been estimated that 4,000-5,000 new residents registered between September 10 and October 3, the day that registration closed. Despite the national attention drawn to the Senatorial contest between Albert Gore and William Brock, and the attention drawn regionally to the District Court's opinion, there was no evidence of significant voting irregularities attributable to the Order of the District Court. Moreover, as a matter of administrative convenience, it appears that Tennessee registrars need not maintain separate registration lists for Presidential elections and other elections, since the provisions of Tennessee law now correspond to the time periods of the 1970 Voting Rights Act.

SUMMARY OF ARGUMENT

1. Strict Equal Protection Review Is Required.

Tennessee's durational residency requirements must be judged for equal protection purposes under the compelling state interest test. This test is applicable in two broad areas of cases; where the classification involved is based on suspect criteria; and where the deprivation at stake is of a fundamental right. Both triggering elements are present in this case. In *Shapiro v. Thompson*, 394 U. S. 618 (1969), this Court declared that classification on the basis of recent interstate travel was inherently suspect. 394 U. S. at 661 (Harlan J., dissenting.) The District Court below, consistent with *Shapiro*, made a similar finding. The District Court also found that the waiting period deprived respondent-appellee and the class which he represents of the fundamental right to vote. The deprivation was an absolute denial of the franchise, like that in *Evans*

v. Cornman, 398 U. S. 419 (1970); *Kramer v. Union Free School District*, 395 U. S. 621 (1969), and *Carrington v. Rash*, 380 U. S. 89 (1965). This absolute disfranchisement is as much a deprivation of a fundamental right as is the dilution of the vote. *Hadley v. Junior College District*, 397 U. S. 50 (1970); *Wells v. Rockefeller*, 394 U. S. 542 (1969); *Kirkpatrick v. Preisler*, 394 U. S. 526 (1969); *Avery v. Midland County*, 390 U. S. 474 (1968); *Reynolds v. Sims*, 377 U. S. 533 (1964). Of course, not just any indirect impediment to voting will trigger strict review. The traditional test, for example, still applies where the alleged deprivation of the right to vote is no more than the refusal to supply absentee ballots. *McDonald v. Bd. of Election*, 394 U. S. 802 (1969). But no such indirect burden is imposed by Tennessee's waiting period. There is no way that a bona fide resident can controvert the conclusive presumption of ineligibility, so the deprivation is of the franchise itself, a fundamental right. Cf. *Carrington v. Rash*, 380 U. S. 89 (1965).

Another basis for applying strict review in the case of durational residency requirements for voting is that they infringe the constitutionally fundamental right of interstate travel. *United States v. Guest*, 383 U. S. 745 (1966). The sole, incontrovertible basis of classification is recent interstate movement. No other criteria are germane, nor can the Election Commission waive this prerequisite upon any showing by a prospective voter who is a new resident. While the waiting period may not deter mobile citizens from changing residences, it certainly penalizes them solely for exercising this fundamental right, and thus subjects the infringement to strict constitutional scrutiny. *United States v. Arizona*, 91 S. Ct. 260, 317 (1970) (opinion of Brennan, J.). Strict review is thus required here not only because a suspect classification is involved, but also because the Tennessee voter waiting periods infringe on two fundamental constitutional liberties.

2. Strict Review Requires Invalidation of Tennessee's Voter Waiting Periods.

Under the compelling state interest formula, the equal protection inquiry must proceed at three levels. See *Williams v. Rhodes*, 393 U. S. 23 (1968). First, the court must look at the goals that state asserts on behalf of the restrictive classification. If these objectives are constitutionally permissible, then the court must determine whether they are drawn with such precision as not to curtail more of the liberties involved than is absolutely necessary. Finally, if the aim is found to be legitimate, and the means adopted to achieve the legislative policy are the least restrictive possible, then the state still must show that the legitimate interest is sufficiently compelling to justify the infringement on fundamental liberties. Thus, the court must examine the restriction to determine whether it is necessary to promote not only a legitimate but a compelling state interest. *Kramer v. Union Free School District*, 395 U. S. 621 (1969); *Williams v. Rhodes*, 393 U. S. 23 (1968).

There is some evidence that the statewide waiting period, enacted in 1870 and unchanged since then was a post-Reconstruction attempt at eliminating carpetbaggers from participation in Tennessee politics. To the extent that this remains an element behind the continued imposition of the waiting period, it is an illegitimate legislative objective. Deterring in-migration, even if political in nature, is not constitutionally allowable. *Shapiro v. Thompson*, 394 U. S. 618 (1969). To the extent that the state interest asserted is that of "educational probation . . . to . . . identify [new residents] with the wants and interests of the people with whom [they] propose to live," *Cook v. State*, 90 Tenn. 407 (Pickle) (1891), it also is an impermissible state policy goal. This Court made it clear in *Carrington v. Rash*, 380 U. S. 89, 93-94 (1965) that

“‘[f]encing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.” If the alleged state interest in an informed electorate is defined in terms of requiring of its voters “a period of residency sufficiently lengthy to impress upon them the local viewpoint”, then clearly this indoctrination is an impermissible justification. **Hall v. Beals**, 396 U. S. 45, 54 (1969) (Marshall, J. dissenting). In view of the literacy test proscription of the Voting Rights Act (prohibiting any test or device which is designed to enforce a knowledgeability requirement on the exercise of the franchise), it is doubtful whether even the state’s interest in a voter’s intelligence and ability to learn about political issues is still legitimate. **Lassiter v. Northampton County Bd. of Elections**, 360 U. S. 45 (1959) upheld a state’s constitutional right to impose some literacy standards as a prerequisite to voting, but Tennessee has not sought to distinguish among any of its bona fide residents on the basis of literacy; reliance on this justification at this point, especially in light of the Voting Rights Act of 1970, is unpersuasive and far from necessary or compelling even if permissible. See **United States v. Arizona**, *supra*.

The only policy interest that the District Court found legitimate was prevention of fraud. The Court found that the durational residency requirements were not necessary to achieve this asserted state interest. Durational residency requirements in Tennessee pre-date the introduction of voter registration. Statewide registration did not come about until 1951. Acts of 1951, ch. 75. Prior to that, durational residency was used as a gross means of maintaining the “purity of the ballot”. But with the system of registration, the durational residency period became functionless, a vestigial remnant which served only to disfranchise thousands of new Tennessee residents each year. Even the theory behind durational residency requirements as a

tool for preventing fraud is misguided. Combating voting fraud means weeding out nonresidents from residents, not distinguishing new residents from longtime residents; but the system of durational residency does not achieve this goal. As this Court pointed out in *Shapiro v. Thompson*, 394 U. S. 618, 636 (1969), "The residence requirement and the one-year waiting period requirement are distinct and independent prerequisites . . ." But even if duration of residency were permissible as establishing a so-called objective standard of residency—a principle rejected in *Shapiro*—it would fail in its mission of thwarting voting fraud. Justice Marshall makes this point very well:

The nonresident, seeking to vote, can as easily falsely swear that he has been a resident for a certain time, as he could falsely swear that he is presently a resident. The requirement of the additional element to be sworn—the duration of residency—adds no discernible protection against "dual voting" or "colonization" by voters willing to lie.

Hall v. Beals, 396 U. S. 45, 54 (1969) (Marshall, J. dissenting).

Thus, under the compelling state interest standard, Tennessee's durational residency period for voting must fall as a violation of equal protection under the fourteenth amendment. Either the interests purported to be served by the restriction on the franchise are illegitimate, or they are so overbroad as not to be necessary to promote any interest at all. For this reason, the opinion of the District Court should be affirmed.

3. Tennessee's Voter Waiting Periods Even Violate Traditional Equal Protection Standards.

Where traditional review is applied, the Court need only find some rational connection between the legitimate state policy objective and the means selected to achieve

that objective. **McGowan v. Maryland**, 366 U.S. 420, 425-26 (1961). Nevertheless, even if this minority position is accepted, the rational connection test still requires the invalidation of Tennessee's voting waiting periods. There is no rational basis for believing that the waiting period weeds out nonresidents who seek to violate the "purity of the ballot." Anyone willing to swear falsely and commit a criminal offense will not likely be deterred by having to swear additionally that he has lived in Tennessee for one year and in a county for three months. Once he decides to lie about being a bona fide resident, a fraudulent voter is no less likely to swear falsely about the duration of his residence. And there is no procedure, other than affidavit, by which the county election commissions attempt to verify the bona fides of new registrants who swear that they have met the waiting period. Moreover, the data available indicate that the disfranchised tend to be highly educated, highly skilled persons who would be best able to exercise the franchise intelligently and responsibly. Cf. **Turner v. Fouche**, 396 U.S. 346, 361-64 (1970). In short, the durational element of the residency requirement is designed to accomplish nothing with respect to insuring the "purity of the ballot", or the intelligent use of the franchise.

4. Tennessee's Durational Residency Requirements Violate Procedural Due Process as Conclusive Presumptions Which Do Not Rationally Relate to the Objective Sought.

Conclusive presumptions which have a substantial adverse impact on the exercise of constitutional rights are not looked upon with favor by the courts. **Aptheker v. Secretary of State**, 378 U.S. 500 (1964); **Carrington v. Rash**, 380 U.S. 89 (1965); **United States v. Robel**, 389 U.S. 258 (1967); **Leary v. United States**, 395 U.S. 6 (1969). Thus, in **United States v. Provident Trust Co.**, 291 U.S. 272, 281-82 (1933), this Court in invalidating a conclusive presumption, observed that

[t]he rule in respect of irrebuttable presumptions rests upon grounds of expediency or policy so compelling in character as to override the generally fundamental requirement of our system of law that questions of fact must be resolved according to the proof.

The Tennessee durational residency requirements for voting establish an irrebuttable presumption that plaintiff, and members of the class he represents, cannot qualify to participate in the state's electoral process, much as Texas forbade "a soldier . . . to controvert the presumption of non-residence." *Carrington v. Rash*, *supra*, at 96.

There is no reason for Tennessee to exclude new residents from its eligible electorate solely because they are recent arrivals. Indeed, such a purpose would be constitutionally impermissible as a penalty on the right of free travel. *Shapiro v. Thompson*, 394 U. S. 618, 631 (1969); *United States v. Jackson*, 390 U. S. 570, 581 (1968). There must be some other basis on which to explain the restrictive classification. It must stand as a surrogate, a proxy, for some other concern of the state. In serving this role, it acts as a conclusive presumption, and must be analyzed constitutionally as such, regardless of whether it is conceptualized as a rule of evidence or a substantive principle of law. Since there is no rational connection between durational residency requirements and voting qualifications, and since this nexus must be shown to support a statutory presumption in the face of a challenge under due process, the exclusion violates procedural due process.

In *Heiner v. Donnan*, 285 U. S. 312 (1932), the Supreme Court said that failure to give a party an opportunity to amass facts that show the irrationality of a statutory presumption violated due process. In *Leary v. United States*, 395 U. S. 6 (1969), this Court specifically stated that the determination of a presumption's constitutionality is a highly empirical matter.

A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling on such a challenge a Court must, of course, be free to re-examine the factual declaration. 395 U. S. at 38, n. 68.

The importance of having an opportunity to present evidence in a meaningful hearing has received greater recognition by this Court recently. *Boddie v. Connecticut*, 91 S. Ct. 780 (1971); *Goldberg v. Kelley*, 397 U. S. 259 (1970); *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969). Yet the State has mustered no evidence to show that interstate movers, as a group, are less well informed than non-movers. Nor has there been any showing that new residents, as a group, actually know less about the issues or candidates involved in an election, provided they establish residency while the registration books are still open (30 days before election day). In short, the state has made no showing of any empirical evidence to support the conclusive presumption which the durational residency requirement enforces. Yet, the Davidson County Election Commission ruled that evidence of honesty and competence was irrelevant.

In the face of strong evidence to rebut the state's empirical position, and the revolution in communications which has facilitated the flow of information in a manner unforeseeable in 1796, when the county waiting period was first enacted, or in 1870, when the statewide waiting period was adopted for the first time, there is no demonstrated, or demonstrable nexus between length of residency and ability to cast an intelligent vote. Since the deprivation of the rights of appellee and other members of his class by the conclusive presumption is extreme, and since no opportunity is afforded to rebut the empirical assumptions of the presumption, the durational residency provisions with respect to voting are unconstitutional as a violation of due process under the fourteenth amendment.

5. Tennessee's Durational Residency Provisions for Voting Broadly Infringe Fundamental Liberties and Thereby Violate Substantive Due Process Since There Is No Necessary Relationship to the Objectives Sought.

Under a substantive due process approach to state legislation which infringes important individual liberties, the emphasis is on weighing competing claims so as to determine the rationality of the means adopted by the state for achieving the articulated state objective. The Court must analyze and weigh the following factors: the nature of the interest affected; the extent to which it is affected; the rationality of the connection between legislative means and purpose; the existence of alternative, less restrictive means for effectuating the purpose, and the degree of confidence the Court has that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen. See *Williams v. Illinois*, 399 U.S. 235, 260 (Harlan, J. concurring). When all of these factors are considered, any reasonable balancing will show that, short of "a talismanic incantation" of "state's rights", see *United States v. Robel*, 389 U.S. 258, 263 (1967), the interests the state purports to serve by the voting waiting periods are not achieved by their application. Other methods of preventing fraud and assuring intelligent use of the ballot are available, and must be used as less drastic means of promoting the interests the state seeks to further. See Appellants' Brief, at 10. Consequently, since fundamental freedoms of political association and interstate travel are at stake; since the waiting periods do not effectively further their purported objectives; and since more precisely tailored alternatives are available, Tennessee's durational residency restrictions on the franchise violate the substantive guarantees of due process.

ARGUMENT

I. The Tennessee Durational Residency Requirements as a Qualification for the Exercise of the Franchise Violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

A. The appropriate standard of review under equal protection

The Supreme Court, in evolving standards for decision under the Equal Protection Clause, has recognized that "the Equal Protection Clause is not shackled to the political theory of a particular era. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change." *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966). What may be characterized as the traditional test in Equal Protection adjudication requires the Court to examine whether the objective the state seeks to further and whether the classification in question bears a rational relationship to this legitimate goal. This test was formulated in the **Sunday Closing Cases** as follows:

Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.

McGowan v. Maryland, 366 U.S. 420, 425 (1961).

While this traditional standard remains viable in many areas of equal protection adjudication, especially in the

"area of economics and social welfare," see, e.g., *Dandridge v. Williams*, 397 U.S. 471, 484-86, 489-90 (1970); cf. *Turner v. Fouche*, 396 U.S. 346, 364 (1970), it has come to be replaced in two broad categories of cases. Compare *Kramer v. Union Free School District*, 395 U.S. 621, 626 n.6 (1969), and *Evans v. Cornman*, 398 U.S. 419 (1970), with *McDonald v. Board of Elections*, 394 U.S. 802 (1969). The first of these categories involves situations where the interests at stake are "fundamental"; the second occurs when the classifications made are "suspect". In these areas, the Court has exercised a strict standard of review, placing the onus on the State to justify the classification as necessary to achieve a compelling state interest. A mere showing that there is some rational connection between the end sought and the means adopted to achieve that end is insufficient to uphold a discriminatory classification where the interest is deemed fundamental or the classification suspect.

In cases where strict review is required, this Court has derived a three-step analytical framework: 1) Are the interests the classification purports to further legitimate state interests? 2) If the interests are legitimate, is the statute drawn narrowly enough to meet the test of necessity? See *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Embrandt v. Russell*, 384 U.S. 11 (1966); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); 3) If the interest of the State is legitimate, and if the means used to promote it are necessary and narrowly enough drawn, is the interest of the State so compelling as to warrant the resultant infringement on fundamental liberties? See *Kramer v. Union Free School District*, 395 U.S. 621 (1969).

Whether analyzed under the traditional rational basis formula or under the "compelling interest" standard, Tennessee's durational residency provisions for exercising

the franchise constitute a violation of the Equal Protection Clause of the Fourteenth Amendment. As the District Court held, the durational aspect of Tennessee's voter residency period fails to meet either the "compelling interest" test, which the lower court held applicable to these voting restrictions, or the traditional equal protection measure:

Neither the purpose of, nor the justification for, these latter requirements can be found in either the Tennessee Constitution or the Tennessee Code Annotated, and this court is of the opinion that they are not 'necessary' to promote any 'compelling state interest' and, indeed, serve no valid purpose (A. at 49).

It is the position of appellee that the District Court was correct in applying the more strict "compelling interest" test. Strict review is applicable both because fundamental rights are at stake and because a suspect classification has been employed to disfranchise an entire class of new residents of whom appellee is representative.

In **Kramer v. Union Free School District**, 395 U.S. 621, 627 (1969), this Court said that

if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

Cf. **Bates v. Little Rock**, 361 U.S. 516 (1960); **Sherbert v. Verner**, 374 U.S. 398 (1964). Similarly, in **Shapiro v. Thompson**, 394 U.S. 618 (1969), where a one-year waiting period for receipt of public assistance was invalidated as a violation of Equal Protection, the Court specifically rejected the traditional connection test when fundamental constitutional rights are at stake: "... any classification

which serves to penalize the exercise of that right [the right to interstate travel], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." 394 U.S. at 634 (emphasis in original). Cf. *Wyman v. Bowens*, 397 U.S. 49 (1970).

Comparison of *Kramer v. Union Free School District* and *Shapiro v. Thompson* with *McDonald v. Board of Elections*, 394 U.S. 802 (1969) and *Dandridge v. Williams*, 397 U.S. 471 (1970) reaffirms the distinction that this Court has maintained in equal protection adjudication between fundamental rights and other matters such as those concerning economics and social welfare. See *Shapiro v. Thompson*, 394 U.S. 618, 658 (1969) (Harlan, J. dissenting). In *McDonald*, a unanimous Court applied traditional equal protection principles to an Illinois statutory scheme governing absentee ballots. Former Chief Justice Warren pointed out that the record did not support any inference that the right to vote was being denied; as the Court indicated, the *McDonald* petitioners were seeking a right to an absentee ballot, 394 U.S. at 807, and there was no evidence that Illinois would not have made alternative provisions for the logistical arrangements of getting the temporarily incarcerated petitioners to the polls so as to cast their ballots. 394 U.S. at 808 n.6. What distinguished *Kramer*, where strict review was applied, was that there was no absolute bar to the franchise in *McDonald*. See *Kramer*, *supra*, at 626 n.6. Thus, not all voting cases are analyzed under the stricter equal protection formula. Only certain kinds of voting cases fall under this closer scrutiny—cases where "a State declares that an entire class of citizens is ineligible . . . and that class is defined in a way in which individual merit plays no part." *Williams v. Rhodes*, 393 U.S. 23, 44 (1968) (Harlan, J. concurring). Cf. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965). Tennessee's durational residency requirements for voting are precisely this sort

of absolute restriction on the exercise of the franchise by an entire class of new residents, and therefore are subject to close constitutional scrutiny by this Court. Cf. **Evans v. Cornman**, 398 U.S. 419 (1970) in which a unanimous court held strict review applicable to a Maryland ruling disfranchising residents of a federal enclave. Nothing in **United States v. Arizona**, 91 S.Ct. 260 (1970), which involved the power of Congress under Section 5 of the Fourteenth Amendment, is to the contrary.

The contrast between **Shapiro v. Thompson** and **Dandridge v. Williams** further supports the vitality of the distinction of equal protection standards on the basis of the existence of a fundamental right. In **Shapiro**, this Court found an infringement of the fundamental right of interstate travel, and this triggered strict review. In **Dandridge**, this Court reluctantly held that traditional review was the appropriate equal protection measure because no fundamental rights were infringed. Conceding that subsistence was at stake in the case of state maximum welfare grants, just as in the welfare eligibility criteria in **Shapiro**, this Court distinguished **Shapiro** on the ground that there the fundamental right to interstate travel was abridged, whereas in **Dandridge** only matters affecting "economics and social welfare" were at stake:

Cf. **Shapiro v. Thompson**, 394 U.S. 618, where, by contrast, the Court found state interference with the constitutionally protected freedom of interstate travel.

Dandridge v. Williams, 397 U.S. 471, 484 n. 16 (1970). Regardless how one views the **Dandridge** opinion, it does make clear the continuing distinction between different formulae of equal protection. Justice Harlan, in his concurrence, explicitly rejected the narrow holding of the majority; for him, the fundamental interest branch of the "compelling interest" test has no role in equal protection adjudication, see **Shapiro v. Thompson**, 394 U.S. 618, 660-

63 (1969) (Harlan, J. dissenting), and his separate opinion in *Dandridge* rejects the approach of the majority in which the traditional test was relegated to the "area of economics and social welfare". "It is on this basis, and not because this case involves only interests in 'the area of economics and social welfare,'" that Justice Harlan joined the "Court's constitutional holding." *Dandridge v. Williams*, *supra*, at 490. Nevertheless, Justice Harlan speaks alone in rejecting the fundamental interest branch of the "compelling interest" test, all other members of the Court agreeing by implication that it is applicable when fundamental rights are abridged. Thus, it is found that once fundamental rights are involved, the strict standard of review is applicable. See *City of Phoenix v. Kolodziejaki*, 399 U.S. 204 (1970); *Evans v. Cornman*, 398 U.S. 419 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

Corresponding examples of the application of strict review can be drawn from cases involving suspect classifications. In *Korematsu v. United States*, 323 U.S. 124, 216 (1944), a Japanese relocation case, the Court began its analysis with the following warning:

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is . . . courts must subject them to the most rigid scrutiny.

In *McLaughlin v. Florida*, 379 U.S. 184 (1964), the Court invalidated as a violation of equal protection a statute which prohibited cohabitation by an interracial couple. Citing *McGowan v. Maryland*, *supra*, the Court observed that the widest discretion is normally allowed the legislature's judgment, and any benefit of the doubt is given to justify legislative action as reasonable; but where the class drawn is racial, and hence suspect, the inquiry is "whether there clearly appears . . . some overriding statu-

tory purpose requiring the proscription of the specified conduct.” 379 U.S. at 192.

Loving v. Virginia, 388 U.S. 1 (1967), is an example where both elements eliciting strict review were present. Cf. **Williams v. Rhodes**, 393 U.S. 23 (1968). In striking down an anti-miscegenation statute, this Court rejected the argument that there was no violation of equal protection since the law applied equally to blacks and whites. Strict review was occasioned because the classification involved race and was therefore suspect, and because the right at stake—marriage—was deemed fundamental. Cf. **Griswold v. Connecticut**, 381 U.S. 479 (1965). Thus, where a case involves both a suspect classification and a fundamental interest, the standard of review is strictest. It must next be considered whether, under the decisions of this Court, fundamental rights are affected or suspect classification are involved.

B. Strict review is applicable

1. Fundamental Rights Are Involved

A) Voting

1). The Right to Exercise the Franchise Is a Fundamental Right

Unless this Court is willing to turn its back on the voting rights cases of the past decade, it must find that the franchise restriction imposed on new residents by Tennessee’s durational residency provisions infringes a fundamental right. **Wesberry v. Sanders**, 376 U.S. 1 (1964), **Reynolds v. Sims**, 377 U.S. 533 (1964), **Carrington v. Rash**, 380 U.S. 89 (1965), **Harman v. Forssenius**, 380 U.S. 528 (1965), **Harper v. Virginia Board of Elections**, 383 U.S. 663 (1966), **Avery v. Midland County**, 390 U.S. 474 (1968), **Kramer v. Union Free School District**, 395 U.S. 621 (1969), **Cipriano v. City of Houma**, 395 U.S. 701

(1969), *Evans v. Cornman*, 398 U.S. 419 (1970), and *City of Phoenix v. Kolodziejewski*, 399 U.S. 204 (1970). Under both federal constitutional law and Tennessee law, the exercise of the franchise is a fundamental political right. See *State v. Staten*, 46 Tenn. 233 (1869).

Although a state is not constitutionally obligated to provide elections for all offices, see *Sailors v. Board of Education*, 387 U.S. 105 (1967), and *Fortson v. Morris*, 385 U.S. 231 (1966), when it does decide to use the elective process, it must distribute the franchise according to equal protection standards. *Kramer v. Union Free School District*, 395 U.S. 621 (1969).

In *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), this Court said:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

In *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), the Court observed that

since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

The strict review applied in the Reapportionment Cases, e.g., *Wells v. Rockefeller*, 394 U.S. 542 (1969), *Kirkpatrick v. Preialer*, 394 U.S. 526 (1969), combined with the pervasiveness of the one man, one vote rule, e.g., *Hadley v. Junior College District*, 397 U.S. 50 (1970), *Avery v. Midland County*, 390 U.S. 474 (1968), are indicative of the importance with which voting rights issues have been regarded.

Just as this Court has examined closely cases where the vote has been diluted, it examines closely cases where the right to vote has been denied. For example, in **Evans v. Cornman**, 398 U.S. 419, 422-23 (1970), the Court noted that

a State may not dilute a person's vote . . . , and a lesser rule could hardly be applicable to a complete denial of the vote.

As this Court stated in **Kramer**, 395 U.S. at 626-27:

Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives.

The reason for concern is that "statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." **Kramer**, supra, at 626. See **Evans v. Cornman**, 398 U.S. 419 (1970); **Williams v. Rhodes**, 393 U.S. 23 (1968); **Harper v. Virginia Bd. of Elections**, 383 U.S. 663 (1966); **Carrington v. Rash**, 380 U.S. 89 (1965); **Terry v. Adams**, 345 U.S. 461 (1953); **Smith v. Allwright**, 321 U.S. 649 (1944); **United States v. Classic**, 313 U.S. 299 (1941).

Thus, it is appropriate to characterize the exercise of the franchise and statutes which determine voter qualifications as fundamental concerns of the individual and of society. Under the applicable standard of equal protection, the Court must apply strict review, requiring the state to advance compelling reasons to justify the necessity of disfranchisement resulting from discrimination among bona fide residents on the basis of durational residence.

2) Durational Residency Requirements
Abridge the Exercise of the Fundamental
Right to Vote and Thereby Trigger Strict
Review

The imposition of durational residency requirements for voting presents a much stronger case for the application of strict review than many of the previous voter qualification cases decided by this Court. The analogy to **Evans v. Cornman** and **Carrington v. Rash**, cases which evoked but a single dissenting vote, is striking. The rationale of **Kramer v. Union Free School District** goes well beyond the doctrine necessary to invalidate Tennessee's durational residency requirements under equal protection. In some respects, **Kramer** reflects the most difficult case in which to justify strict review; the Court there found that strict review was to be applied expansively in voter exclusion cases, being triggered whenever "some resident citizens are permitted to participate and some are not." 395 U.S. at 629. Yet, **Kramer** involved a specialized election for school board and not general franchise qualifications for state legislative or gubernatorial office or national office. The Court's conclusion that "the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials," 395 U.S. at 627, is much more easily applied to the durational residency situation where in fact an entire class of new residents is excluded from participation at any level of government. How much more strikingly applicable is the Court's analysis to the situation of total disfranchisement from the body politic than to exclusion from a special purpose election. And this exclusion is not for the one year that might appear superficially. In the case of United States Senator, the effective period of disfranchisement and of political impotence is six years, for governor four years;

for United States Representative two years; and for various elective judgeships eight years. Tennessee Constitution, Art VI, §§ 3, 4. In **Kramer**, the Court found that

The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality (Footnote omitted).

395 U.S. at 628. In dissent, Justice Stewart points out that this reasoning is most directly applicable to participation in elections for state legislature. He goes on to note that "appellant is of course fully able to participate in the election of representatives in that body. There is simply no claim whatever here that the state government is not 'structured so as to represent fairly all the people,' including the appellant." 395 U.S. at 639. That, however, is precisely the claim in the durational residency situation. In **Lucas v. Colorado General Assembly**, 377 U.S. 713 (1964), Justice Stewart parted company with the majority he joined in **Reynolds v. Sims**, a case decided on the same day. In **Lucas**, Justice Stewart was careful to enumerate what was not there at stake:

It is important to make clear at the outset what these cases are not about. They have nothing to do with the denial or impairment of any person's right to vote. Nobody's right to vote has been denied. Nobody's right to vote has been restricted.

377 U.S. at 744. What distinguished **Lucas** from **Reynolds** was that in **Lucas** the apportionment scheme had been voted upon by the people in a referendum, a procedure

that was available for future remedy of any self-imposed "malapportionment". Justice Stewart believed this system to be constitutionally permissible, disagreeing with the majority which held that a state, whether through legislative action or direct action by the people in a referendum, could not "malapportion" itself.

This disagreement surfaced again in *Avery v. Midland County*, 390 U.S. 474 (1968), where the majority held that the one man, one vote rule was applicable to local sub-units of government with general legislative power. The dissenters felt that a properly constituted state legislature should have leeway in structuring local units of government. This position was specifically rejected by the *Avery* majority which held that statutes structuring local government units receive no less strict scrutiny merely because the state legislature is fairly elected. 390 U.S. 474, 481 n. 6 (1968). And in *Kramer*, in response to Justice Stewart's criticism of the Court's rationale, the majority said:

[T]he assumption [that institutions of state government represent fairly all the people] is no less under attack because the legislature which decides who may participate at the various levels of political choice is fairly elected. Legislation which delegates decision making to bodies elected by only a portion of those eligible to vote for the legislation can cause unfair representation. Such legislation can exclude a minority of voters from any voice in the decisions just as effectively as if the decisions were made by legislators the minority had no voice in selecting.

395 U.S. at 628.

Lucas and *Avery* are relevant to distinguish *Carrington* and *Cornman* from *Kramer*. In the case of disfranchisement of new residents on the basis of a calendar waiting period, there is no question of applying strict review to an election for a sub-unit of government. On the contrary, it

is quite clearly a total bar from the political process at any level. Application of strict review is therefore required since the substantial disfranchisement of 3-10% of the population of a state is likely "systematically to prevent ultimate effective majority rule." *Lucas v. Colorado General Assembly*, 377 U.S. 713, 754 (1964) (Stewart, J. dissenting). Moreover, when applied to a system of voter disfranchisement whose principle of classification is solely based upon the exercise of a constitutionally protected right—the right of interstate travel—and when the exclusion is total, the critique of the dissenters in *Kramer* is not applicable. Consequently, the voter durational residency case is actually far less difficult doctrinally than *Kramer*; invalidation of Tennessee's calendar waiting period requires no extension of *Kramer*, but in fact falls comfortably within the contours of the less difficult *Carrington* and *Cornman* situations. Cf. 395 U.S. at 640, n. 9-10.

Another problem raised by the dissenters in *Kramer* was that the opinion of the majority, by defining broadly the category of interested persons constitutionally required an opportunity to participate in elections, invited abandonment of even a residency period. Appellee does not challenge the residency requirement for voting, which Tennessee has interpreted to mean domicile. *Brown v. Howze*, 163 Tenn. 178, 42 S.W. 2d 210 (1931). Indeed, the state concedes, and the District Court found, that appellee is unquestionably a bona fide resident of Tennessee; the sole qualification he lacks is the three month county and one year statewide calendar waiting period. This is not a case of a resident of West Memphis, Arkansas, claiming a sufficient interest in a Memphis, Tennessee, election because he happens to work in Memphis. There is no challenge to the geographical integrity of the voting constituency. The challenge is only that once a resident, having exercised his federal constitutional right of interstate travel, has become

a bona fide member of the community, cf. *Carrington v. Rash*, 380 U.S. 89 (1965), subject to the responsibilities of citizenship in the state including the duty to pay taxes, T.C.A., §§ 67-2601-02, to buy Tennessee tags for his automobile and qualify for a Tennessee motor vehicle operators license, T.C.A., §§ 59-401, -704, the state cannot discriminate against him in distributing the franchise provided he is otherwise qualified.

In *Kollar v. City of Tucson*, 319 F. Supp. 482 (D.Ariz. 1970), plaintiff attempted to raise the issue alluded to by the dissenters in *Kramer*. Kollar lived outside the geographical boundaries of the city of Tucson, but was served by the Tucson water works; he claimed a substantial pecuniary interest in a vote on the Tucson Water Revenue Bonds Project since water rates may reflect the additional revenue needed to pay the principal and interest obligations on the bonds. Citing *Kramer* and the District Court opinion in *Blumstein v. Ellington*, the three-judge court found that the compelling state interest standard was applicable; but it went on to note that

Unlike the cases wherein courts have invalidated one-year residency requirements [footnote cites District Court opinion in this case], our case involves a challenge to boundary definitions of residency . . . [W]e here find that neither plaintiff is "as sufficiently affected and directly interested as the residents" in the challenged bond election. Generally, residents have a greater interest in the outcome of local elections than do nonresidents.

Kollar v. City of Tucson, 319 F. Supp. 482, 484 (D. Ariz. 1970). Clearly, if appellee were challenging the ability of the state to define geographical constituencies, extension of the principles enunciated in *Kramer* would be necessary. But no such issue is involved in the case of durational periods of residency for voting. The state and

county remain the geographical anchors defining the relevant constituencies, and nothing herein challenges the traditional power of the state to draw the geographical boundaries of sub-units of government. See **Hunter v. City of Pittsburgh**, 207 U.S. 161 (1907). The distinction between residency and durational residency cannot be overemphasized.

Tennessee's durational residency requirements disfranchise new residents from all elements of the political process. Unlike **Phoenix v. Kolodziejaski**, 399 U.S. 204 (1970), there is no dispute that elections for major political representatives are involved. The dissenters in **Phoenix** questioned the applicability of strict review to a vote for approval of a bond issue. Justice Stewart noted that there was no claim that members of the city council were not fairly elected. Nevertheless, he acknowledged that “[i]f this case really involved an ‘election’, that is, a choice by popular vote of candidates for public office under a system of representative democracy, then our frame of reference would necessarily have to be **Reynolds v. Sims**, 377 U.S. 533, and its progeny.” 399 U.S. at 215. There can be no doubt that the disfranchisement brought about by Tennessee's durational residency period restricts participation in elections for public office, so the objections raised by the dissenters in **Phoenix** do not apply to the calendar waiting period for voting.

The distinction which the District Court drew between residency and durational residency cannot be overemphasized. The state in its brief continually alludes to an alleged challenge to Tennessee's residency requirement. This is misleading since it is only the durational aspect that is under question. Many cases decided by this Court involving voting rights have noted that the state is constitutionally entitled to establish reasonable standards of residency. **Kramer v. Union Free School District**, *supra*.

Most states have used this freedom to define "domicile" as the test of residency for voting purposes. See *Brown v. Hawn, supra*. Some states, however, require physical presence as well as domicile in order to qualify as a voter. See Brief Amicus Curiae for Bipartisan Committee on Absentee voting in *Hall v. Beals*, 396 U.S. 45 (1969). Even state residency definitions, however, are not immune from constitutional attack when a state cannot show them to be necessary to promote a compelling state interest. See *Evans v. Cornman*, 398 U.S. 419 (1970); *Carrington v. Rash*, 380 U.S. 89 (1965). Certainly no less a standard can be applied when the basic residency test has been met, and the only missing qualification is the additional calendar waiting period.

The requirement for actual residence has a long history which supports its validity; but it is interesting to note that the distinction between a residence requirement and a waiting period requirement was explicitly recognized by the Framers. In the Constitutional Convention, the question of qualifications for members of the House of Representatives and Senate arose. In Article I, Section 2, the Constitution provides:

No person shall be a Representative who shall not have attained the Age of twenty five years, and been seven years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

In the Convention, it was felt that a seven year durational citizenship period would protect the fledgling republic from being taken over by adverse foreign influences—a device against "insidious intrusion by foreign nations". PADOVER, TO SECURE THESE BLESSINGS: THE GREAT DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1787 247-49 (1962). Two forces then pulled in opposite directions with respect to residency in the state from which the representative

would be elected. Some (like Gouverneur-Morris) opposed requiring that a representative even be a resident of the state from which he was elected; others felt that a waiting period should also be imposed within the state. Rutledge of South Carolina proposed that a seven year waiting period in the state be imposed to correspond with the durational citizenship requirement so that candidates would be able to acquire knowledge of local affairs. Eventually, votes were taken on the durational residency issue for candidates. A three year period was defeated by a vote of 9-2, and a one year period was defeated by a 6-4 margin, North Carolina and New Jersey switching sides joining South Carolina and Georgia, with Maryland divided. II FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 219 (1911).

The proponents of durational residency periods argued that time was necessary to attain local knowledge so that candidates would represent the people of the district better. The opponents, such as Read, pointed out that a national government was being formed and "such a regulation [state durational residency for candidate] would correspond little with the idea that we were one people." II FARRAND 217. Mercer stated that "[s]uch a regulation would present a greater alienship among the States than existed under the old federal system. It would interweave local prejudices and State distinctions in the very Constitution which is meant to cure them." *Ibid.* Thus, the Framers expressly rejected the need for in-state residency with respect to both Representatives and Senators. Article I, Section 3. The distinction between residency and durational residency was debated, and, even for candidates for office, the Framers felt that a waiting period was an unjustifiable restriction on the political process, and a blow at the national unity the Framers were striving to achieve.

The permissibility of age, citizenship and residency requirements for voting, as contrasted with duration of

residency requirements for voting, gains further support from section 2 of the Fourteenth Amendment. Section 2 imposes a penalty upon states which do not grant the vote to male inhabitants of a state, twenty-one years of age and over and citizens of the United States. As in the sections establishing qualifications for Representative and Senator, section 2 uses the term inhabitant, without any mention whatsoever of a waiting period. Consequently, while section 2 of the Fourteenth Amendment is the source of the repeated admonitions of this Court that states have wide latitude in establishing age, citizenship and residency requirements, this broad power is not conferred with respect to calendar waiting periods.

It surely would seem anomalous that appellee, upon moving to Tennessee, would be qualified to run for office as a United States Representative but would not be able to vote for himself. Were appellee thirty years of age, the same anomaly would present itself if he were to run for United States Senator. Yet, the factors supposedly supporting the imposition of waiting periods for voting apply even more strongly to candidates for office. In **Hadnott v. Amos**, ... F. Supp. ... (M.D. Ala. 1970), a three-judge panel invalidated Alabama's six month county and three month precinct voter registration waiting period; however, also involved in that case, was the validity of Alabama's requirement that candidates for circuit judge reside in the circuit from which they are elected for twelve months prior to their election. By a 2-1 majority, the court upheld this candidate calendar residency period because of the differences between voters and candidates:

... [T]he majority recognizes that the role of the candidate and of the voter differ in a democratic society, so that the state may have a compelling interest in requiring residency for candidates that is different from its asserted interest in requiring residence for

voters. Participation in the political process and freedom to move from place to place are overriding considerations in the case of the voter. His qualifications are minimal, and he need subject himself to the scrutiny of no one in the performance of his role in selection of public officers. . . . The candidate . . . must have the special capacities that will enable him to perform the office he seeks, and his possession or lack of possession of those capacities need to be exposed to those who will make the choice. Nonexposure of . . . the candidates with voters choosing from lack of knowledge, is a much more serious strain on the sinews of democracy.

Hadnott v. Amos, . . . F. Supp. . . . (M.D. Ala. 1970) (Slip opinion at 31), aff'd 39 U.S.L.W. 3410 (U.S. March 23, 1971). By summarily affirming this element of **Hadnott**, this Court implicitly recognized the validity of the distinction the Alabama District Court drew. Nevertheless, constitutional history indicates that faced with this same problem with respect to qualifications for the national legislature, the Framers explicitly chose to risk the "more serious strain on the sinews of democracy" by rejecting imposition of a candidate waiting period in a state. With this in mind, it is inconsistent to read the Federal Constitution as allowing states to condition exercise of the franchise upon a durational period of residence within a state, unless it can justify the restriction by an overriding interest.

Nothing in **United States v. Arizona**, 91 S. Ct. 260 (1970), which involved the constitutionality of certain provisions of the Voting Rights Act of 1970, undercuts the validity of the District Court's reliance on this Court's voting rights decisions. In **Arizona**, this Court faced the issue of Congressional power under section 5 of the Fourteenth Amendment. This Court was called upon to define the

limits of Congress' power, under the doctrine of *Katzenbach v. Morgan*, 384 U.S. 641 (1966), to declare the meaning of the equal protection clause of Section 1. By a margin of 8-1, the provisions in the 1970 Voting Rights Act which set durational residency maxima for presidential elections were sustained. Only the section of the Act relating to voting age elicited significant division in the Court. But clearly, the age qualification, as Justice Stewart points out, is quite different from a durational residency requirement. Justice Black makes this point when he states that "[t]he establishment of voter age qualifications is a matter of legislative judgment which cannot be properly decided under the Equal Protection Clause." 91 S. Ct. at 266, n. 10. Accordingly, Justice Black saw "[t]he crucial question . . . not who is denied equal protection, but rather which political body, state or federal, is empowered to fix the minimum age of voters." *Ibid.* Similarly, Justice Stewart, referring to the Court's voting rights and voter qualifications cases, notes, "we have been careful in those decisions to note the undoubted power of a State to establish a qualification for voting based on age." 91 S. Ct. at 349. Section 2 of the Fourteenth Amendment is the source relied upon to distinguish age from durational residency. See *United States v. Arizona*, 91 S. Ct. 260, 349, n. 14 (1970) (Stewart, J. concurring and dissenting).

The problem of deciding age qualifications under equal protection standards is not the same as that posed by durational residency requirements. Arguably, if it were conceded that a state could impose some calendar waiting period which treated new residents differently from long-time residents, the line-drawing problems the Court faced in *Arizona* would arise. Justice Stewart noted that no one challenged the necessity for some age minimum for voting:

Yet to test the power to establish an age qualification by the 'compelling interest' standard is really to deny

a State any choice at all, because no State could demonstrate a 'compelling interest' in drawing the line with respect to age at one point rather than another. Obviously, the power to establish an age qualification must carry with it the power to choose 21 as a reasonable voting age. . . .

91 S. Ct. at 349. But, as the District Court below found, it is constitutionally impermissible, because violative of equal protection, for a state to discriminate against new residents by imposing a separate calendar waiting period.¹ Consequently, there is not the same impossible task of line-drawing that faced the Court in the age qualification situation.

Conceptual clarity in this matter will be aided by reference to terminology developed by Professor Ely in **Legislative and Administrative Motivation in Constitutional Law**, 79 YALE L.J. 1205 (1970). Ely points out that not every classification need be justified by a legitimately defensible difference. For example, in the selection of a jury, a state need not justify the selection of jurors A-L by show-

¹ This does not go to the issue of how long a time period before an election a state may close its registration books for administrative reasons. See **Beare v. Smith**, . . . F. Supp. . . . (S.D. Tex., Pan. 1971). Tennessee has decided that thirty days is ample time to perform the needed administrative chores between the end of registration and election day. This is the same judgment that the United States Congress made in the 1970 Voting Rights Act, and the judgment made by more than [two thirds] of the state legislatures. The essential difference between the interval between the close of registration and a calendar residency period is that the registration-election hiatus is universally applicable to new longtime residents alike, and therefore not a violation of equal protection. Of course, this Court could and perhaps should impose the Tennessee standard as a constitutional maximum since it does coincide with the Federal practice and with the overwhelming majority of the states; this might promote administrative convenience and close an obvious loophole in the District Court's opinion, but if the Court should omit any reference to this interval, it would have to deal with situations such as that raised in **Beare** under Due Process standards.

ing that they were more qualified (whatever that may mean) than M-X. All that is necessary is that the state show that the system by which jurors are chosen is free from bias, and that it can withstand scrutiny as a rational procedure. In cases like jury selection, what Ely refers to as the "disadvantageous distinction model" is inapplicable because the legislative goals (he labels them "discretionary goals") are so amorphous, that their very definition depends on the decision-maker's value preferences. Accordingly, the relation between such a goal and various choices cannot be evaluated as rational or irrational. 79 YALE, L.J. at 1240 n.109. This analysis would be directly applicable to the age qualification standard, where, once a state were asked to come up with a legitimately defensible difference (between, say, 21 and 18) it could not meet its burden. Application of the "disadvantageous distinction model" therefore would have the result that Justice Stewart outlines in Arizona, taking the power to determine age qualifications away from the states, not because age qualifications are unacceptable, but because no single age minimum can be persuasively defended. The result is to supersede state legislative discretion with Congressional discretion. In such a situation, Justice Black may be correct in his assertion that the issue is not equal protection (under the disadvantaged distinction model) but the level of government which can exercise legislative (i. e., discretionary) power.

Where imposition of state durational residency periods for voting is concerned, the same considerations do not militate against application of the disadvantageous distinction analysis. Ely himself acknowledges that "[i]t is difficult in 1970 to imagine that voter qualification laws could not be subject to the disadvantageous distinction model . . . [and] be defended by the state in terms which are rationally (indeed, 'compellingly,' . . .) related to a likelihood of responsible exercise of the

franchise. . . ." 79 YALE L.J. at 1275, n. 203. In a subsequent note, Ely makes it clear that voter qualifications, in general, are now subject to the disadvantageous distinction model and *ab initio* require a "more than rational" or compelling defense: 79 YALE L.J. at 1277, n. 212. In determining the constitutionality under equal protection of durational residency requirements, the Court is not drawn into the kind of policy decision involved in the age qualification. There are two easily classifiable groups—bona fide residents who meet the durational periods and bona fide residents who do not—and the asserted relationship between the restriction and the objective is no more "discretionary" (in Ely's sense) than was the case in **Carrington v. Rash**, **Harman v. Forsenius**, or **Evans v. Cornman**.

Furthermore, the dangers of abuse that are involved when the disadvantageous distinction model is not applied are not present in the age qualification case but are present in the durational residency situation. In **Grandal v. Nevada**, 73 U.S. (6 Wall.), 35 (1868), this Court invalidated a \$1 tax Nevada imposed on every person leaving the State by commercial carrier. The Court noted that "if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars." 73 U.S. at 46. When analysis such as that used by Justice Black in **Arizona** is used, in which the key issue is one of "power", there is always the danger that this power, if held paramount, will be abused. In the voter age qualification situation, this danger does not present itself because of the guidance of section 2 of the Fourteenth Amendment, which sets twenty-one years as a permissible minimum. Consequently, there is no real possibility that a state would take the analysis of Justice Black or Justice Harlan in **Arizona** as an indication of a constitutional carte blanche for setting, for example, 50 years as the age minimum. See 91 S. Ct. at 350 n. 14 (Stewart, J. concur-

ring and dissenting). However, were the same analysis applied to the voter calendar residency situation, there is no assurance that states would not see this as an effective way of "protecting" themselves from outside influences. Indeed, there is some evidence that this was one of the motivating forces behind Tennessee's imposition of a statewide durational residency period in 1870. See *infra*.

If this Court follows the analysis used with respect to age in Arizona here with respect to durational residency, there might not be any constitutional impediment to increasing the length of the waiting period to, say, 10 years. Faced with a longer period, the Court would be in the same doctrinal box it now is in. Once it concedes the state's power to set calendar residence periods, it is in no position to draw a line on a "reasonableness" basis, for there are no analytical handles by which to judge the acceptability of 3 months, one year, or ten years. Moreover, there are no convenient guidelines elsewhere in the Constitution, as there is in section 2 of the Fourteenth Amendment with respect to age. Arguably, the Court could examine durational residency provisions in terms of motivation, but this Court has time and again indicated that this is, at best a dubious enterprise. See, e.g., United States v. O'Brien, 391 U.S. 367 (1968).

In sum, appellee has shown that the decisions of this Court have held that exclusion of an entire class from the franchise affects fundamental rights, especially where the class is defined without regard to individual merit and where the classification principle relies wholly upon the exercise of a constitutionally safeguarded right (interstate travel). When fundamental rights are affected, equal protection doctrine requires strict review by this Court. The case of state durational residency requirements for voting falls squarely within well settled equal protection

voting rights doctrine, not requiring any extension of **Kramer v. Union Free School District** and indeed not even going as far conceptually as **Kramer**.

B) Travel

1) The Right to Travel Is Fundamental

The Supreme Court has repeatedly classified the right to travel fundamental. In **United States v. Guest**, 383 U.S. 745, 757 (1966), the Supreme Court said that “[t]he constitutional right to travel from one state to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.”

One aspect of the right to travel can be traced to Article IV of the Articles of Confederation, which provided that “the people of each State shall have free ingress and regress to and from any other State.” In the United States Constitution, the thrust of the Articles in this regard was adopted and broadened: “the citizens of each State shall be entitled to all privileges and Immunities of Citizens in the several States.” Art. IV, Section 2. In **Corfield v. Coryell**, 4 Wash. C.C. 371 (1823), Justice Washington described the contents of the privileges and immunities conferred by Art. IV, Section 2 as those “which are, in their nature, fundamental” and included as fundamental the “right of a citizen of one State to pass through, or reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise.” Article 13(1) of the Universal Declaration of Human Rights reiterates the basic nature of the freedom of travel: “Everyone has the right to freedom of movement and residence within the borders of each state.” As the Court in **Guest** said, citing **Crandall v. Nevada**, 73 U.S. (6 Wall.) 35 (1868), and **Passenger Cases**, 7 How. 283 (1849):

For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States. . . .

United States v. Guest, 383 U.S. 745, 758 (1966).

This was the position taken at the Constitutional Convention by opponents of the proposal that members of the House of Representatives be required to live for a period of years in the states from which they were elected prior to election. Mr. Read, an opponent of state durational residency qualifications for Congressional office, noted that "we are now forming a **Natil** [sic] govt and such a regulation would correspond little with the idea that we were one people." II FARRAND 217 (emphasis in original).

The Court in **Guest** noted that there "have been recurring differences in emphasis within the Court as to the source of the constitutional right to interstate travel", but concluded that "[a]ll have agreed that the right exists". 383 U.S. at 759. In **United States v. Arizona**, 91 S.Ct. 260, 321 (1970), for example, Justice Brennan continued to maintain the ambiguity as to the specific constitutional source of the right to travel:

From whatever constitutional provision this right may be said to flow [footnote omitted], both its existence and its fundamental importance to our Federal Union have long been established beyond question.

Justice Stewart, on the other hand, found that "[f]reedom to travel from State to State—freedom to enter and abide in any State in the Union—is a privilege of United States citizenship." **United States v. Arizona**, 91 S. Ct. 260, 345 (1970). Regardless of the source, this constitutionally safe-guarded liberty means that "a citizen of the

United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State." (Emphasis added.) **United States v. Arizona**, 91 S. Ct. 260, 345 (1970) (opinion of Stewart, J.), citing **Slaughter-House Cases**, 83 U.S. (16 Wall.) 36, 80 (1873). Compare **Carrington v. Rash**, 380 U.S. 89, 100 (1965) (Harlan, J., dissenting) ("I think a legitimate distinction may be drawn between those who come voluntarily into Texas in connection with private occupations and those ordered into Texas by military authority").

In **Aptheker v. Secretary of State**, 378 U.S. 500 (1964), the Supreme Court held that the freedom of international travel was a fundamental right under the Fifth Amendment. Since the right to travel was closely linked to freedom of speech and association, 378 U.S. at 517, the Court found that the government's restriction on granting passports to members of Communist organizations ordered to register with the Subversive Activities Control Board was a denial of a constitutionally protected right. **Aptheker** reaffirmed the principle enunciated by this Court in **Kent v. Dulles**, 357 U.S. 116, 126 (1958), that "[f]reedom of movement is basic in our scheme of values."

That the right to travel is derived both from the structure of the federal government and concepts of personal liberty is clearly expressed by the Court in **Shapiro v. Thompson**, 394 U.S. 618, 629 (1969):

This Court long ago recognized that the nature of our Federal Union and constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.

As an aspect of liberty, the right to travel inheres in the person, like freedom of speech. This right therefore extends to intrastate, as well as interstate, and international travel. See, e.g., **King v. New Rochelle Municipal Housing Authority**, 314 F. Supp 37, 40 (S.D.N.Y. 1970). Implicit in this concept is the freedom to live where one pleases, and, upon establishing a bona fide residence, enjoying all the rights of citizenship on an equal footing with long-time residents. Freedom of travel is a fundamental constitutional right requiring strict review by this Court of any abridgment.

2) Tennessee's Durational Residency Requirements for Voting Penalize the Right of Travel and Therefore Trigger Strict Equal Protection Review.

Any discussion of the abridgment of the right of interstate travel in an equal protection context must begin with this Court's opinion two years ago in **Shapiro v. Thompson**, 394 U.S. 618 (1969), in which durational residency requirements for the receipt of welfare benefits were invalidated under strict constitutional scrutiny. In **Shapiro**, the Court explicitly rejected the traditional rational connection equal protection standard:

At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. [citations omitted] The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right,

unless shown to be necessary to promote a compelling governmental interest, is unconstitutional. (Emphasis in original.) 394 U.S. at 634.

In canvassing possible justifications for imposition of a waiting period requirement, the Court examined and rejected the states' claim that deterrence of in-migration of indigents was a permissible basis for classification. 394 U.S. at 631. From this discussion, Tennessee apparently concludes that the sole defect of the statutes invalidated in **Shapiro** was their objective to deter migration of welfare recipients. (Appellants' Brief at 13-14.) Of course, if such a purpose can be ascertained (and there is some evidence that "protection" against carpetbaggers indeed was an objective of Tennessee's statewide durational residency requirement for voting; see *infra*), this Court is obligated to invalidate the statute. **United States v. Jackson**, 390 U.S. 570, 581 (1968) ("If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional")². But there is nothing in **Shapiro** which supports appellant's contention that a "finding of deterrence"³ is the essential

² This Court, naturally, has shied away from resting decisions on the alleged intent of the legislature in enacting statutes. See, e.g., **United States v. O'Brien**, 391 U.S. 367, 383 (1968). As former Chief Justice Warren observed, dissenting in **Shapiro**, the Court will not attribute an impermissible purpose to a legislature if the result would be to strike down an otherwise valid statute. 394 U.S. at 651-52. For this reason, a constitutional rule which relied on motivation of the legislature would be most difficult to apply, except in extra-ordinary circumstances. Cf. **Gomillion v. Lightfoot**, 364 U.S. 339 (1960).

³ Presumably, the State of Tennessee could have directed its focus away from the "objective" to deter migration to the "impact" of deterring migration. See Appellants' Brief, at 13-14. To be sure, a showing of substantial deterrence will carry some weight in determining whether the abridgement of the right to travel is so insubstantial that it can be justified by an overriding state interest. See **Shapiro v. Thompson**, *supra*, at 676 (Harlan, J. dissenting). But this showing is not a necessary ele-

ingredient in triggering application of strict review. Any such finding flies in the face of Justice Harlan's express conclusion in dissent in *Shapiro* that the deterrent effect of the waiting periods was negligible. 394 U.S. at 671-72. Moreover, this Court has not found the determinative factor in right to travel cases the deterrent effect. For example, in *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868), the Court acknowledged that the one dollar tax imposed by Nevada on those leaving the state "cannot sensibly affect any function of the government, or deprive a citizen of any valuable right." 73 U.S. at 46. Nevertheless, the Court invalidated the statute as a violation of the right of interstate travel.

It is therefore no coincidence that the Court in *Shapiro* did not speak in terms of deterrence in determining whether there has been sufficient infringement upon the right of interstate travel to trigger strict review. While rejecting the traditional equal protection yardstick, the Court established a threshold quite different from a deterrence requirement:

Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest.
(emphasis in original)

ment in triggering strict equal protection review; this is the clear implication of Justice Harlan's conclusion, supported by the representations of appellees in their briefs in *Shapiro*, that a deterrent effect on migration was not shown. 394 U.S. at 671 n. 30. Thus, in the language of *Shapiro*, 394 U.S. at 638 n. 21, a showing of deterrence may be a factor in determining whether there is a "penalty" on the exercise of the constitutional right to interstate travel. But such a showing is neither a necessary nor a sufficient condition for a finding of "penalty" that triggers strict review. See *infra*. A showing of deterrence, however, may be significant in weighing the state's claim that its restrictions promote a compelling interest.

394 U.S. at 638. This is not the language of deterrence as Justice Stewart's concurrence makes clear. After noting that the objective of deterring in-migration is constitutionally impermissible, Justice Stewart goes on to note that "any other purposes offered in support of a law that so clearly impinges upon the constitutional right of interstate travel must be shown to reflect a **compelling** governmental interest." 394 U.S. at 634-44 (emphasis in original). Consequently, the threshold question for determining whether strict equal protection review is to be applied is not whether waiting periods deter migration but rather whether they "impinge" upon interstate travel (394 U.S. at 644) (Stewart, J. concurring), or whether they "touch on" interstate travel. (394 U.S. at 638.)

In pointing out the obvious—that its holding in *Shapiro* would not be directly applicable to other kinds of durational residency provisions—the Court chose the word "penalty" to characterize the threshold determination with respect to application of strict review. 394 U.S. at 638, n. 21. That term, of course, is not free from analytical ambiguity and in some circumstances can require a finding of punitive intent. That, however, clearly is not its necessary meaning. It can mean "disadvantage", "loss", or "hardship" as well. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961).⁴ See Appendix. Justice Brennan,

* In this regard, perhaps an illustration of the difference between penalty and deterrence would be helpful. A youthful driver may be deterred from moving to another state which grants driver's licenses only to persons a year or two older, but this restriction would not fall into the category of a penalty imposed solely because of the exercise of the right to travel. In the instant case as well as in *Shapiro*, the penalty is imposed for one reason only—the applicant's not having resided in the state for a requisite period of time. Thus, appellee could not vote only because he was a new resident, his bona fide residence acknowledged by appellants and found as a fact by the District Court. In the case of the young driver moving to another state, there is no deprivation of a driver's license because the newcomer is a new resident. Instead, all persons—old and new

who wrote the opinion of the Court in **Shapiro**, indicated his interpretation of its meaning in the context of durational residency requirements for voting when, in **United States v. Arizona**, 91 S. Ct. 260, 321-22 (1970), he stated:

By definition, the imposition of a durational residency requirement operates to penalize those persons, and only those persons, who have exercised their constitutional right of interstate migration. Of course, governmental action that has the incidental effect of burdening the exercise of a constitutional right is not *ipso facto* unconstitutional. But in such a case, governmental action may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest [citations omitted]. And once it be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect compelling state interests is upon the party seeking to justify the burden.⁵

Justice Stewart's opinion in **United States v. Arizona** lends support to this interpretation of the meaning of "penalty" as used in **Shapiro** as the threshold trigger of strict equal protection review. Although the issue in **Ari-**

residents alike must be of a prescribed age to drive. Hence, the young driver is not denied equal protection, and no penalty arising from the exercise of the right to travel is involved. See Brief for United States as Amicus Curiae at 15 n. 16, **Hall v. Beals**, 396 U.S. 45 (1969).

⁵ There can be little dispute that Vermont law requiring a one year durational residency before voter eligibility is conferred penalizes recent arrivals from other states who have not fulfilled the required residency period even if they have in fact become bona fide residents. This affects the rights of recent arrivals adversely and hampers their right to travel interstate. We hold that defendants must also justify this restriction by the compelling state interest standard. **Kohn v. Davis**, ... F. Supp. (D. Vt. 1970) (Typed opinion Part VI).

zona was that of Congressional enforcement power, it is clear that Congress can only legislate in support of and protection of federally guaranteed rights. Accordingly, if, as Justice Stewart held, "Congress . . . has the power under the Constitution to eradicate political and civil disabilities which arise by operation of state law following a change in residence from one state to another," 91 S. Ct. at 345, then the degree of abridgement of federal rights which enables federal protection legislation must be the same threshhold level of abridgement which triggers strict review under the fundamental interest branch of equal protection.⁶

It is made clear in Justice Stewart's opinion in *Arizona* that federal power is permissibly exercised with respect to

⁶ In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), this Court indicated that Congressional power under section 5 of the Fourteenth Amendment was not in all cases coextensive with the independent force of the equal protection clause of section 1. Thus, even though literacy requirements for exercise of the franchise were constitutionally permissible, *Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (195?), the Court upheld, on Supremacy Clause grounds, a provision of the 1965 Voting Rights Act which effectively served to enfranchise Puerto Rican-Americans who were literate in Spanish despite a New York statute requiring English literacy. In a sense, what *Katzenbach v. Morgan* did was to create a no man's land in equal protection jurisprudence in which state classifications were not *per se* unconstitutional, but could be overruled by federal Congressional power if the national legislature perceived that a state statute endangered equal protection of the laws to a group of citizens. The result of *Morgan* was in some instances to establish dual standards for judging constitutional questions; the equal protection clause still retained a certain impact of its own, but Congress was given an independent power under Section 5 to remedy what it perceived to be in effect incipient equal protection violations. There is a certain analogy from *Morgan* to the treatment the Court was given to litigation involving the Commerce Clause. That clause serves as authority for Congressional action, but it also, by negative implication, has a force of its own which in some cases invalidates state action of its own weight. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

But valid federal action under section 5 cannot operate in a vacuum; it must be to enforce guarantees of the Fourteenth

durational residency because "Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the privilege of taking up residence in another State." 91 S. Ct. at 345. In Section 202(a)(2) of the 1970 Voting Rights Act, Congress specifically found that a durational residency requirement as a precondition for voting "denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines." It was on this basis—that a disadvantage or hardship was placed on those who exercised the fundamental right of interstate travel—that Justice Stewart (joined by Chief Justice Burger and Justice Blackmun) upheld Congressional authority to eliminate durational residency requirements for voting

Amendment. 384 U.S. at 651 n. 10. As Justice Harlan in dissent points out, Congress' power is "to take appropriate remedial measures to redress and prevent the wrongs." 384 U.S. at 666 (Harlan, J. dissenting). One way to read **Morgan**, then, especially in light of **United States v. Arizona**, *supra*, is that Congress can take affirmative steps to safeguard what it may reasonably determine to be incipient infringements of Fourteenth Amendment rights, but that it cannot also determine "as a matter of substantive constitutional law what situations fall within the ambit of the clause [i.e. equal protection], and what state interests are 'compelling'." **United States v. Arizona**, *supra*, at 350 (opinion of Stewart, J.).

Once to be conceded that Congress cannot determine substantive constitutional principles under the guise of "enforcing" constitutional guarantees, there is no other way to explain the holding reached by Justice Stewart in **Arizona** with respect to section 202 than to acknowledge that a substantive violation of the constitutionally protected right of interstate travel was involved, and that Congress' action in eliminating durational residency requirements for voting in Presidential elections was remedial in nature. If this be true, then it cannot be gainsaid that these same durational residency requirements at least impinge on interstate travel as to other elections for Congress, state legislature and governor. Of course, this admission does not end the equal protection analysis, since the restrictions may be necessary to promote a compelling state interest. But the argument does require the application of strict review under equal protection, indicating that for this purpose the durational residency provisions for voting serve to penalize the exercise of a fundamental constitutionally protected right.

in Presidential elections: "Congress has acted to protect a constitutional privilege which finds its protection in Federal Government and is national in character." 91 S. Ct. at 346.

Of course, in a footnote, Justice Stewart observed that the question of federal power to protect against disabilities imposed on those who exercise their right of interstate travel, especially when limited to Presidential elections, is a different question than that posed in the instant case. 91 S. Ct. at 348 n. 9. But for the present purposes, the important aspect of Justice Stewart's opinion in **Arizona** is its explicit recognition that Congressional action in enacting Section 202 of the 1970 Voting Rights Act was constitutional because it aimed at protecting United States citizens who moved interstate from political disabilities imposed solely because they exercised a constitutionally protected right. In the context of the **Shapiro** footnote, 394 U.S. 638 n. 21, then, the opinions of both Justice Brennan, (joined by Justice White and Justice Marshall) and Justice Stewart (joined by Chief Justice Burger and Justice Blackmun) in **Arizona** support application of strict review to an equal protection challenge claiming that Tennessee's durational residency requirement for voting impinges on the fundamental right of United States citizens to enter and abide in any state of the Union. This still leaves open the question raised in the footnote in **Shapiro** whether the waiting period promotes a compelling state interest.

2. Tennessee's Durational Residency Requirements Are Based on a Suspect Classification and Therefore Require Strict Equal Protection Review.

The crux of the suspect classification analysis is that there are certain differences among citizens which may in some cases be unavoidable but which if used as the basis for differential treatment will place the onus upon the

state of showing a compelling state interest to justify the discrimination. Whether or not the Court agrees that Tennessee's durational residency requirements for voting constitute a penalty upon the right of interstate travel within the meaning of footnote 21 of *Shapiro v. Thompson*, it should be clear, as the district court below found, that classification on the sole basis of exercising a constitutionally protected right is inherently suspect. The cases discussed in the Appendix (e.g. *Slochower, Speiser v. Randall, Specack v. Klein, Griffin v. California, Gardner v. Broderick*) support the proposition that a civil disability imposed solely because a person has exercised a protected freedom (interstate migration) must be justified by an overriding state interest if it is to withstand constitutional scrutiny.⁷

Normally, the courts have found suspect those classifications which deny rights or privileges to a class of persons foreclosed from effective representation in the normal political processes of the state. See, e.g., *United States v. Arizona, supra*, at 349 n. 14, 350 (opinion of Stewart, J.); *Kramer v. Union Free School District, supra*, at 640 n. 10 (Stewart, J. dissenting). In such cases, it falls to the courts to provide an extra measure of protection for their

⁷ If, for example, a legislature wanted to keep illiterates from voting, and—out of genuine though monumentally stupid considerations of administrative convenience—decided that “Negroes” constituted an appropriate shorthand for the class of persons it wanted to exclude, the Court would swiftly and properly void the law because its terms were woefully overinclusive and underinclusive with respect to the acceptable goal of disenfranchising illiterates. Indeed, this approach, which has obvious connections with the Court’s theories of attainder and overbreadth, seems to me to begin to suggest the most sensible meaning which can be attached to the Court’s evolving notion of “suspect classification.”

Thus even where there is no suspicion of illicit motivation, the term in which a law is drafted can serve to invalidate it because they do not fit any acceptable goal with sufficient precision.

Ely, *supra*, at 1249, n. 134.

interests. The classic statement of this principle is the famous footnote in **United States v. Carolene Products Co.**, 304 U.S. 144, 152-54 n. 4 (1939):

[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied on to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Historically, the most conspicuous application of the suspect classification doctrine has been to classifications based on race. **Korematsu v. United States**, 323 U.S. 214 (1944); **McLaughlin v. Florida**, 379 U.S. 184 (1964); **Loving v. Virginia**, 388 U.S. 1 (1967). However, there have been other bases of classification which have been held suspect with the attendant strict review under equal protection. For example, in the **Reapportionment Cases**, the Court has evolved a rule that an unequal apportionment of population among geographic regions is inherently suspect under equal protection standards. While the Court still does not require absolute mathematical equality among districts, failure to achieve precise mathematical equality results in strict judicial scrutiny because the deviation is inherently suspect. **Hadley v. Junior College District**, 397 U.S. 50 (1970); **Wells v. Rockefeller**, 394 U.S. 542 (1969); **Kirkpatrick v. Preisler**, 394 U.S. 526 (1969); **Avery v. Midland County**, 390 U.S. 474 (1968); **Swann v. Adams**, 385 U.S. 440 (1967). Cf. **Wright v. Rockefeller**, 376 U.S. 52 (1964).

Wealth is another suspect classification. Imposition of a fee may in some circumstances be constitutionally permissible, but it requires strict judicial scrutiny. Thus, the Supreme Court has ruled that inability to pay must not deprive an indigent of the right to appeal in a criminal case, **Griffin v. Illinois**, 351 U.S. 12 (1956), and imposition

of a poll tax cannot be a prerequisite to the exercise of the franchise in any election. **Harper v. Virginia Bd. of Elections**, 383 U.S. 663 (1966); cf. **Harman v. Forssenius**, 380 U.S. 528 (1965); **Cipriano v. City of Houma**, 395 U.S. 701 (1969); **City of Phoenix v. Kolodziejaski**, 399 U.S. 204 (1970). The Court in **Harper**, noting that it had previously held homesite an impermissible basis for distinguishing between qualified voters, said that "the same must be true of requirements of wealth or affluence or payment of a fee." 383 U.S. at 667. Citing **Korematsu v. United States**, *supra*, the Court clearly placed classifications on the basis of wealth in the suspect category: "Lines drawn on the basis of wealth or property, like those of race [citation to **Korematsu** omitted] are traditionally disfavored." 383 U.S. at 668.⁸

Discrimination on the basis of occupation is still another kind of classification which is not favored, and therefore requires strict review. In **Carrington v. Rash**, 380 U.S. 89 (1965), the Supreme Court invalidated a Texas restriction that made members of the armed forces ineligible to establish residence for voting purposes. The Court noted that the fact that a classification treats the members of a class equally does not end the judicial inquiry. Cf. **Loving v. Virginia**, 388 U.S. 1 (1967). Citing **McLaughlin v. Florida**, 379 U.S. 184, 191 (1964), a racial classification case, the Court indicated that strict review was appropriate because

⁸ Accord: **Williams v. Illinois**, 399 U.S. 235 (1970); **Tate v. Short**, 91 S.Ct. 668 (1971). Nothing in **James v. Valtierra**, 39 U.S.L.W. 4488 (U.S. April 26, 1971) is to the contrary. In **Valtierra**, the Court found that no classification on the basis of wealth had been made since California did not select low-income housing alone for popular referendum. Instead, as the Court found, California had a long Populist tradition of direct democracy, giving the people the final choice in a multitude of public policy decisions. Consequently, no wealth classification was there involved. **Valtierra** therefore has no relevance to the suspect classification doctrine with respect to voting disqualifications based solely on recent interstate travel.

of the nature of the discrimination involved. 380 U.S. at 93. Quoting from its opinion in **Gray v. Sanders**, 372 U.S. 368, 380 (1963), the Court made it clear that occupation was a suspect classification: "[T]here is no indication in the Constitution that . . . occupation affords a permissible basis for distinguishing between qualified voters within the State." 380 U.S. at 96.

Like race, geography, wealth, and occupation, classification among bona fide residents on the basis of recent interstate movement is suspect and requires strict review by the Court. See A. 46-47, cf. **Williams v. Rhodes**, 393 U.S. 23 (1968). In **Shapiro v. Thompson**, 394 U.S. 618 (1969), this Court added durational residency to the list of suspect classifications. See **Shapiro v. Thompson**; *supra*, at 659 (Harlan, J. dissenting). The Court observed that the welfare restrictions, establishing a one-year waiting requirement for eligibility for public assistance created

two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid. . . .

394 U.S. at 627. The Court found that classification based on durational residency inherently penalized the exercise of the fundamental right to travel and were therefore suspect. 394 U.S. at 634. In any ordinary society, persons newly arrived are not only a minority, but an impotent one at that, lacking not only access to the established sources of power in the community, but also ties to each other that would make them a more cogent political force. The instability of group membership adds to group impotence. Only the intervention of the courts can protect the position of this small but significant minority. As Jus-

tice Stewart pointed out in **United States v. Arizona, supra**, at 345-46:

Federal action is required if the privilege to change residence is not to be undercut by parochial local sanctions. No State could undertake to guarantee this privilege to its citizens. At most a single State could take steps to resolve that its own laws would not unreasonably discriminate against the newly arrived resident. Even this resolve might not remain firm in the face of discriminations perceived as unfair against those of its own citizens who moved to other States. Thus, the problem could not be wholly solved by a single State, or even by several States, since every State of new residence and every State or prior residence would have a necessary role to play.

What Justice Stewart describes is the epitome of insularity. A federal freedom cannot be championed by a single state effectively, and new residents, by definition are now even impotent to attack the problem in a piecemeal fashion. Clearly this is the kind of problem which faced the Court in **Baker v. Carr**, 369 U.S. 186 (1962); the suspect classification doctrine has direct application so that the state must bear the burden of justifying the voting disqualification by an overriding interest. This does not mean that all durational residency requirements are invalid *per se*; it does mean that the state must show compelling reasons for their continued existence and, as will be shown, the state has not (and could not) brought forth any evidence to support its glib armchair assertions of the conventional wisdom.

C. Application of strict review and changed circumstances undercut the vitality of **Pope v. Williams**

Since July 8, 1970, eight federal districts courts and one state court of appeals have invalidated durational

residency provisions for voting.⁹ In all these cases, the courts have held that strict equal protection review is the applicable constitutional standard. The only opinions of this Court to deal with the merits of durational residency in the context of voting have found them to be invalid. In **Hall v. Beals**, 396 U.S. 45, 52 (1969) (dissent), Justice Marshall noted that the lower courts in **Drueding v. Devlin**, 234 F. Supp. 721 (D.Md. 1964), aff'd 380 U.S. 125 (1965) (per curiam), and **Hall v. Beals**, 292 F. Supp. 610 (D.Colo. 1968),

tested the residency requirement there challenged by the equal-protection standard applied to ordinary state regulations: that is, restrictions need bear only some rational relationship to a legitimate end [Citation omitted]. But if it was not clear in 1965 it is clear now that once a State has determined that a decision is to be made by popular vote, it may exclude persons only upon a showing of a compelling state interest, and even then only when the exclusion is the least restrictive method of achieving the desired purpose.

Accord: **United States v. Arizona**, *supra*, at 317 (opinion of Brennan, J.); *cf. Id.* at 343 (opinion of Stewart, J.) Dissenting in **Shapiro v. Thompson**, *supra*, former Chief Justice Warren stated: "If a State would violate equal protection by denying welfare benefits to those who have recently moved interstate, then it would appear to follow that equal protection would also be denied by depriving those who have recently moved interstate of the fundamental right to vote." 394 U.S. at 654.¹⁰

⁹ In addition to the cases listed in *l.c.* 3-4 of appellee's Motion to Affirm, a District Court in Minnesota invalidated that state's durational residency provision for voting. **Keppel v. Donovan**, ... F. Supp. ... (D. Minn., Dec. 4, 1970).

¹⁰ While the Court in **Shapiro** naturally did not rule on the validity of waiting period requirements in the context of voting, see 394 U.S. 618, 638 n. 21 (1969), the case against dura-

The courts which have sustained voter waiting periods in the past year have relied on the traditional equal protection standard. But even in those cases, there has been recognition that the value of traditional review cases "may be largely historical." See *Cocanower v. Marston*, 318 F. Supp. 402 (D. Ariz. 1970). In *Keppel v. Donovan*, ... F. Supp. ... (D. Minn. 1970) (typed opinion at 4), Judge Lord noted that "[e]arly cases do not provide much precedental value to the instant case."

Thus, he found *Pope v. Williams*, 193 U.S. 621 (1904) inapposite. In *Pope*, this Court upheld a Maryland statute that required citizens moving into the state to declare an intent to remain indefinitely one year before being permitted to register to vote. The Court, answering the argument that the statute abridged a privilege of United States citizenship, said: "The privilege to vote in any

tional residency for voting is even stronger with respect to the right to travel issue. Two of the three dissenting justices in *Shapiro* found the right to travel argument unpersuasive because of their interpretation of § 402(b) of the Social Security Act. Former Chief Justice Warren and Justice Black read the legislative history of the Social Security Act as a Congressional authorization of durational residency requirements for public assistance payments. Consequently, the right to travel argument is deemed weakened since at least one of the pillars on which it is based is the Commerce Clause under which Congress' power is plenary. There is no indication that any Congressional act specifically grants the states the power to enact waiting-period requirements for voting as part of an experiment in "cooperative federalism". Cf. *Shapiro*, 394 U.S. at 645. (Warren, C.J. dissenting). Therefore, the basis on which at least two of the dissenters in *Shapiro* declined to go along with the application of strict review is not present in this case. See *Shapiro*, 394 U.S. at 647-54 (Warren, C.J. dissenting). In short, *Shapiro* held that any purposes "offered in support of a law that so clearly impinges upon the constitutional right of interstate travel must be shown to reflect a compelling governmental interest", *Shapiro*, at 643-44 (Stewart, J. concurring) (emphasis in original). The restriction on voting in this case likewise is based exclusively on the exercise of the fundamental right of travel and impinges on the fundamental right of access to the political process. The "compelling state interest" test therefore is clearly applicable.

State is not given by the Federal Constitution. . . . It is not a privilege springing from citizenship of the United States." 193 U.S. at 632. While the Court acknowledged that the federal constitution prohibited discrimination among different classes of voters, it did not reach the question whether the discrimination between longtime residents and recently arrived residents was permissible under the Fourteenth Amendment. In light of the constitutional history intervening between 1904 and 1970, including ratification of the seventeenth, nineteenth, twenty-third, and twenty-fourth amendments, the California court in *Keane*, like eight other courts, said:

. . . while we surely would follow the *Pope* and *Drueding* cases had not the United States Supreme Court in later cases established a new standard . . . , we should be dishonoring rather than respecting the decisions of the highest tribunal of our nation if we did not follow its later expressions of constitutional interpretation.

90 Cal. Rptr. 263, 266 (1970).

In *Pope*, the Court did recognize that state statutes which distribute the franchise could not discriminate invidiously in violation of guarantees of the federal Constitution. Accordingly, it is not inconsistent with the rationale of the opinion to find that equal protection in 1971 required a stronger burden of justification when fundamental rights are infringed and when suspect classifications are involved. In light of this Court's voting rights cases, and especially in light of *Shapiro v. Thompson*, it has been clear to a large majority of lower courts which have been faced with the question that durational residency requirements for voting must be measured by strict constitutional standards, and that *Pope v. Williams* is no impediment to application of the compelling interest formula. As the district court in Vermont stated:

... one year durational residency ... as a condition precedent to the right to vote ... is an unconstitutional limitation on two fundamental rights, the right to vote and the right to travel interstate. We ... hold that [the] standard of review applicable ... is that of compelling state interest. ... [T]he burden of establishing justification by compelling state interest is on the defendants. This burden has not been sustained.

Kohn v. Davis, ... F. Supp. ... (D. Vt. 1970) (typed opinion, Pt. VIII).

Even if this Court should hold traditional equal protection review applicable, **Pope** is no roadblock to constitutional decision based either on equal protection or due process. The Court in **Pope** did not analyze the case in terms of its unequal impact on new residents. Moreover, the statute in **Pope** was more directly related to an objective standard of ascertaining bona fide residency since the requirement was for actual registration of intent to establish domicile. Tennessee's statute makes no such pre-registration provision, and consequently cannot be justified on the same basis as the **Pope** statute. Furthermore, in light of modern methods of ascertaining one's domicile, especially the advent of the voter registration system, use of this pre-registration system is no longer permissible as an objective measure of bona fide residence. See **Shapiro v. Thomson**, *supra*; **Harman v. Forssenius**, *supra*. In any event, the assumptions of rationality which bear on the constitutional question, both under equal protection and due process, must be reassessed in light of information now available. This is especially important where the Court in its opinion in **Pope** did not come to grips analytically with the issues raised by appellee herein.

D. The Tennessee waiting period requirement for voting is a violation of equal protection because it attempts to achieve impermissible state goals, it does not draw narrow enough distinctions to meet the test of necessity in furthering those goals which are legitimate, and, in no case satisfies the "compelling interest" test.

1. In General

In deciding questions under the Equal Protection Clause, the Court must look at (1) the facts and circumstances behind the law; (b) the interests the state claims to be protecting; and (c) the interests of those disadvantaged by the classification. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). As a preliminary matter, it is important to look at the data to realize the magnitude of the deprivation of voting rights wrought by waiting period requirements.

The people of the United States are, and historically have been, movers. It is inaccurate to view durational residency requirements as a minor disfranchisement necessary to preserve the integrity of a state and/or local community. In the period 1947-1970, the average annual interstate migration was 3.3% of the population over one year of age. This figure remained remarkably constant over this entire 23 year period, with the variance about the mean no greater than 0.3% in any year except 1949-1950 when the rate was 2.6%. U.S. Dept. of Commerce, Bureau Census, Current Population Reports, **Population Characteristics**, Series P-20, No. 210, January 15, 1971, Table 1, pp. 7-8. [Hereinafter 1971 **Census Population Characteristics**.] During the same period, the average rate of intrastate migration (intercounty) was 3.4% of the population, with the variance about the mean no greater than 0.4% except that in 1948-1949 the rate was 2.8%. *Ibid.* The total average percentage of migrants annually over

the 1947-1970 period was 6.5%. In data gathered in March, 1970, the Census Bureau found that over the period twelve months 4,492,000 voting age Americans had moved interstate; 4,197,000 had moved intercounty intrastate, for a total migration sum of 8,689,000 during that single year. In percentage terms, 3.4% of all adults of voting age moved to homes in different states; and 3.2% moved to different homes within the same state but in different counties. Thus, in the one year between March, 1969, and March, 1970, 6.6% of all those of voting age moved either interstate or intrastate. **1971 Census Population Characteristics, Table 3, p. 10.**

In its brief, the state intimates a morbid fear of a "takeover" in some counties by students attending colleges, Brief of Appellants, at 16. This was the same fear articulated in **Carrington v. Rash**, 380 U.S. 89 (1965) by Texas vis a vis servicemen. Just as the Court in **Carrington** rejected this argument categorically with respect to members of the armed forces, it must reject the state's fear here as constitutionally impermissible. Moreover, as a factual matter, the evidence does not support the state's innuendo that the major beneficiary of the abolition of durational residency requirements would be students. But in fact, it is not the durational residency provision so much as the application of the state's definition of bona fide residence which will be the operant factor with respect to student power at the polls. See generally Singer, **Student Power at the Polls**, 31 OHIO ST. L.J. 703 (1970).

The data indicate that migrants are just as likely as non-migrants to be members of the labor force. It is true that a disproportionate number of young adults are mobile and are disfranchised by the sundry durational residency periods, but the overwhelming majority of this number are not students but young adults entering the work force. See generally Norling, **Residence Requirements for Voting: The Patterns of Discrimination** 9-11 (unpublished manuscript, available through Yale Political Science De-

partment and on file at the offices of Common Cause, Washington, D. C.) [Hereinafter **Norling**]; **1971 Census Population Characteristics**, Table 7, pp. 18, 20-21. Furthermore, with respect to occupation, (data available for males only), 40.9% of non-migrants are in white collar occupations in contrast to 52.0% of the migrants (49.7% of intrastate migrants, and 54.3% of interstate migrants); and only 13.4% of non-migrants are professional, technical and kindred occupations, whereas 21.4% of all migrants are of this occupational grouping (19.4% intrastate movers, and 23.3% interstate movers).

In short, the durational residency requirements disfranchise a significant percentage of otherwise qualified citizens each year. The percentage has remained relatively constant over the last 23 years, and amounts to 6.6% of the voting age population. The movers tend to be younger than non-movers, but they tend to be members of the work force. As a class, they are characterized by higher status occupations and as a group have much higher levels of education. See **1971 Census Population Characteristics**, Table 4, p. 12.

Not only would the intent to "fence out" new residents be an impermissible state objective, **Carrington v. Rash**, 380 U.S. 89, 94 (1965), **Hall v. Beals**, 396 U.S. 45, 53-54 (1969) (Marshall, J. dissenting), but the underlying assumption of any such attempt—that the community is a relatively static entity—does not withstand empirical scrutiny, as the foregoing analysis demonstrates. For example, according to 1960 United States Census data, during the years 1955-60, 253,217 people age 5 and over moved into the State of Tennessee, 166,490 of whom were of voting age.¹¹ During that same period, 333,619¹² people age

¹¹ U.S. Bureau of Census, U.S. Census of Population: 1960, Subject Reports, Mobility for State and State Economic Areas, Final Report PC (2)-2B. Table 24 at p. 24 U.S. Government Printing Office, Washington, D. C., 1963.

¹² *Ibid.*

5 and over moved out of Tennessee. Since the 1960 population of Tennessee, age 5 and over, was 3,173,418,¹³ it is clear that the character of the state underwent substantial transformation in just those five years. Similarly, 59,735¹⁴ people age 5 and over moved into Davidson County, and 49,095¹⁵ people age 5 and over moved out during the years 1955-60. The total Davidson County population, 5 years of age and over, in 1960 was 354,415.¹⁶ Clearly, the community that the durational residence requirement is supposed to protect is not the fixed entity one might think.

In addition to general mobility data indicating the dynamic nature of modern American communities, there are figures which specifically illustrate the extent of the disfranchisement brought about by waiting period requirements for voting. 72,946,911 people voted in the 1968 presidential election. The difference in the popular vote between Mr. Humphrey and Mr. Nixon was 499,704, which represents 0.68% of the total vote cast.¹⁷ 3,022,000¹⁸ vot-

¹³ U.S. Bureau of Census, U.S. Census of Population: 1960. Subject Reports, Lifetime and Recent Migration. Final Report PC (2)-2D. Table 5 at p. 17. U.S. Government Printing Office, Washington, D. C., 1963.

¹⁴ U.S. Bureau of Census, U.S. Census of Population: 1960. Subject Reports, Mobility in Metropolitan Areas. Final Report PC (2)-2C. Table 1 at p. 9. U.S. Government Printing Office, Washington, D. C., 1963.

For the 1960 Census, the Standard Metropolitan Statistical Area (SMSA) coincided with the geographical boundaries of Davidson County. This figure is derived by adding the number of movers into the Nashville SMSA from (1) a different SMSA and (2) a nonmetropolitan area.

¹⁵ *Id.*, Table 5.

¹⁶ See note 14, *supra*.

¹⁷ New York Times, *Encyclopedic Almanac*, 1970, at p. 155.

¹⁸ U.S. Bureau of Census, Current Population Reports, Series P-20 No. 192, "Voting and Registration in the Election of November 1968", Table 16 at p. 47. U.S. Government Printing Office, Washington, D. C., 1969.

ers expressly voiced a desire to vote in the 1968 election and were deprived of this right because they could not meet the various state durational residency requirements; this was 4.14% of the total vote cast in the election. This figure represents the disfranchisement of those who did not fulfill sundry durational residency requirements and who specifically expressed the desire to vote. If eligibility alone is examined, the disfranchisement becomes even more significant. Thus, in the 1968 presidential election, 5,590,000 citizens were ineligible to vote solely because they failed to meet one residency requirement or other. This represents 7.7% of the actual vote cast.¹⁹ U.S. Dept. of Commerce, **Population Estimates**, Series P-25, No. 406, Tab 2, Oct. 4, 1968.

2. One Function of the Tennessee Statewide Waiting Period Was to Deter the Immigration of Voters With Different Political Viewpoints, and This Is an Impermissible State Objective.

In **Shapiro v. Thompson**, *supra*, the Supreme Court expressly rejected the deterrence of in-migration as a permissible state objective for legislative action.

We do not doubt that the one-year waiting-period device is well suited to discourage the influx of poor families in need of assistance . . . But the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible. 394 U.S. at 629.

¹⁹ Some commentators have indicated that the disfranchisement may even be greater. MacLeod and Wilberding, in **State Voting Residency Requirements and Civil Rights**, 38 Geo. Wash. L. Rev. 93 (1969) assert that of the 104,000,000 adult citizens of voting age in the 1960 Presidential election, 8,000,000 (or 7.6% of the entire voting population) could not vote because of sundry durational residency requirements.

Thus, the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible. If a law 'has no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional. *United States v. Jackson*, 390 U.S. 570, 581 (1968).' 394 U.S. at 631.

Just as it is impermissible to discourage a certain class (indigents, for example) from immigrating, even if the sole basis for migration is the lure of higher public assistance benefits, *Wyman v. Bowens*, 397 U.S. 49 (1970), it is impermissible to establish barriers to the franchise because of a fear of political diversity. This proposition was forcefully stated in *Carrington v. Rash*, 380 U.S. 89, 93-94 (1965), a case involving a Texas provision barring military personnel from establishing residency for the purpose of voting.

The theory underlying the State's first contention is that 'the Texas constitutional provision is necessary to prevent the danger of a "takeover" of the civilian community resulting from concentrated voting by large numbers of military personnel in bases placed near Texas towns and cities. . . . We stress—and this is a theme to be reiterated—that Texas has the right to require that all military personnel enrolled to vote be *bona fide residents* of the community. But if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation. Cf. *Gray v. Sanders*, 372 U.S. 368. "Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. [T]he exercise of rights so vital to the maintenance

of democratic institutions [citation omitted], cannot constitutionally be obliterated because of a fear of the political views of a particular group of *bona fide* residents (emphasis supplied).

The history of Tennessee's statewide waiting period for voting indicates that it was enacted in response to the abuses of the Reconstruction Era, as an attempt to keep out foreign influences. From Tennessee's admission to the Union in 1796 until the effective end of Radical Republican control in the post-Civil War era in 1870, Tennessee did not have a statewide durational residency requirement for voting. The sole durational residency provision until 1870 was a six-month waiting period in each county.

Immediately after the end of the Civil War, the Tennessee State Legislature enacted a series of laws (the first of which was unabashedly named "An Act to Limit the Elective Franchise") enfranchising the recently emancipated Negroes, and disenfranchising confederate office holders and army officers for fifteen years and confederate sympathizers for five years. See Acts of 1865, ch. 16; Acts of 1865-66, ch. 33 (amending Acts of 1865, ch. 16); Acts of 1866-67, ch. 26 (amending Acts of 1865-66, ch. 33). In 1870, when Radical Republican domination no longer prevailed, Tennessee enacted a new constitution which included the first statewide durational residence requirement for voting (twelve months). That the purpose of the statewide waiting period was primarily to protect the state from external political influences, not for the prevention of voter fraud, can be inferred from the simultaneous repeal in 1870 of the registration requirement passed during Reconstruction as a means of enforcing the restrictive disfranchising acts. Clearly, the legislature was more concerned about the influx of voters with a different political point of view than protecting

the "purity" of the election process. And the statewide period has never been altered in its 100 year lifetime.²⁰

While in the context of post-Reconstruction Tennessee an objective to "fence out carpetbaggers" may be understandable, in the context of 1971 United States constitutional theory, such a rationale is an impermissible basis for disfranchisement. Thus, Congress, in the 1970 extension of the 1965 Voting Rights Act, specifically found that the imposition of durational residency requirements "in some instances has the impermissible purpose or effect of denying citizens the right to vote . . . because of the way they may vote." Section 202(a)(4). The fact that newly arrived Tennesseans may have a more catholic political outlook than longtime residents, "or may even retain a viewpoint characteristic of the region from which they have come, is a constitutionally impermissible reason for depriving them of their chance to influence the vote of their new home state." *Hall v. Beals*, 396 U.S. 45, 53-54 (1969) (Marshall, J. dissenting).

²⁰ It seems that the Tennessee historical experience in this regard is by no means unique. "The historical purpose of residency requirements seems to have been to deny the vote to undesirables, immigrants and outsiders with different ideas." Cocanower and Rich, *Residency Requirements for Voting*, 12 ARIZ L. REV. 477, 478 (1970). The company that new residents keep among the list of the disfranchised is, most charitably, ironic. For example, in the Census Population Estimates, those who comprise the category "Ineligible to Vote", include aliens, and inmates of correctional and mental institutions as two of the three sub-categories, with "failing residence requirement" the third sub-category. This same irony is reflected in the opinion of Justice Harlan in *United States v. Arizona*, *supra*, at 310. He notes that "[m]inors, felons, insane persons, and persons who have not satisfied residency requirements are among those citizens who are not allowed to vote in most States." New residents certainly have anomalous bedfellows!

3. Waiting Periods Do Not Meet the Test of Necessity in Furthering the Legitimate State Interest of Preventing Voter Fraud.

Even if the durational residency requirement is not held invalid as promoting an impermissible state goal, it fails to meet the constitutional test of necessity in achieving the permissible goals it purports to further. One traditional justification for waiting period requirements as a voting qualification is that they help to prevent voting fraud. *Drueding v. Devlin*, 234 F. Supp. 721 (D. Md. 1964), aff'd 380 U.S. 125 (1965).

Clearly, the state has a legitimate interest in the prevention of voter fraud. The question is whether a waiting period requirement is the least restrictive means necessary for achieving that goal.

Dual voting and "colonization" of voters by political groups presented serious threats to the legitimacy of the political process; the political machines often would commandeer men from other states to "cross over" into their state to vote for machine-backed candidates. See Macleod and Wilberding, *VOTING RESIDENCY REQUIREMENTS AND CIVIL RIGHTS*, *supra*, at 94-95. In 1858, the Tennessee Supreme Court noted in dicta that its strict application of the waiting period requirement "may tend, in some degree, to check a very serious practical evil . . . the mischievous struggles, in some quarters of the country, on the eve of an election, to manufacture votes for the occasion, no matter how." *State v. Cloksey*, 37 Tenn. 482, 487 (1858).

Except for a very brief period during Reconstruction, Tennessee did not provide for voter registration until 1890. Acts of 1890, ex. sess., ch. 25 (Applicable only to Shelby and Davidson Counties). And it was not until 1951 that Tennessee passed its first universal registration

law. Acts of 1951, ch. 75. The Tennessee Supreme Court has upheld the registration laws on the ground that they are a necessary means of preventing voter fraud. *Cook v. State*, 90 Tenn. 407, 16 S.W. 471 (1891); *Moore v. Sharp*, 98 Tenn. 491, 41 S.W. 587 (1897). Plaintiff makes no challenge to the imposition of a duty to register on qualified voters. Under T.C.A., § 2-301, the acknowledged purpose of the registration provisions is "to secure the freedom and purity of the ballot box in the various counties of the state by preventing plural voting and by requiring voters to vote in the election precincts in which they reside. . . ." The development of the registration system as a means of combating voter fraud undercuts the importance of durational residency requirements for this purpose.²¹

Under Tennessee law, registration books are closed 30 days prior to a general or primary election. T.C.A., § 2-304. Evidently, this reflects the legislature's judgment about the time necessary to validate the bona fides of new registrants prior to the election. The durational residency requirement adds a much more sweeping restriction which cannot be justified in terms of preventing voter fraud.

²¹ As far as Tennessee has an interest in helping sister states weed out potential dual voting, Tennessee can require a new resident to give up his previous registration at the time of registering in Tennessee, just as a new resident surrenders his previous driver's license when he applies for a Tennessee operator's license. In response to the District Court opinion in this case, and at the urging of appellee, who serves as American Civil Liberties Union consultative representative, the Law Revision Commission is now contemplating a more effective method of guarding against dual registration. See *Election Laws Work Document, Staff Draft for the Law Revision Commission, January, 1971*, proposed section 221 of Title 2 of Tennessee Code: "If the registrant was previously registered in any other place, he shall not be declared a registered voter until he has signed a cancellation of registration form to be sent to the last place he was registered. Upon registration of the voter, the registrar shall mail the cancellation to the place where the voter was last registered."

It creates an invidious barrier to the franchise to bona fide residents whose sole fault is that, though bona fide residents, they are recent arrivals. See A. 48-49. This applies to both the one-year statewide and the three-month county waiting periods. There is no attempt to distinguish among new residents on the basis of a neutral principle relevant to voting competence. All new residents are indiscriminately lumped together and disfranchised.

In **Harman v. Forssenius**, 380 U.S. 528 (1965), Virginia sought to justify a poll tax as a means of preventing voter fraud. The Court, invalidating the tax as a violation of the twenty-fourth Amendment, observed that states which do not require payment of the poll tax found no administrative burden in "insuring that the electorate is limited to bona fide residents." *Id.* at 543.

The availability of numerous devices to enforce valid residency requirements—such as registration, use of the criminal sanction, purging of registration lists, challenges and oaths, public scrutiny of candidates and other interested parties—demonstrates quite clearly the lack of necessity for imposing a requirement whereby persons desiring to vote in federal elections must either pay a poll tax or file a certificate of residency six months prior to the election.

Ibid.

While **Harman** involved federal elections, it was not long before the Court rejected a similar argument with respect to state elections. **Harper v. Virginia Bd. of Elections**, 383 U.S. 663 (1966).

In **Shapiro v. Thompson**, 394 U.S. 618 (1969), the Supreme Court specifically rejected the argument that prevention of fraud was a justification for the imposition of a one-year waiting period.

[T]here is no need for a State to use the one-year waiting period as a safeguard against fraudulent receipt of benefits; for less drastic means are available, and are employed, to minimize that hazard. . . . Since double payments can be prevented by a letter or a telephone call, it is unreasonable to accomplish this objective by the blunderbuss method of denying assistance to all indigent newcomers for an entire year.

Id. at 637 (emphasis supplied). See also, **Keenan v. Board of Law Examiners**, ... F. Supp. ... (E.D.N.C. 1970).

Clearly, the primary purpose of restrictions aimed at preventing voter fraud is to weed out nonresidents from the voting rolls. But the durational residency requirements does not serve this purpose, at least not with the necessary constitutional precision. It is the voter registration laws which now perform this function; plaintiff does not challenge Tennessee's power to maintain the "purity" of its election by requiring that registrants be bona fide residents and that they register prior to voting. The Supreme Court

has often reaffirmed the power of the State to require their voters to be bona fide residents. **Carrington v. Rash**, 380 U.S. 89, 83-94 (1965); **Kramer v. Union Free School District** [395 U.S. 621, 625 (1969)]. But this franchise of persons, not because their bona fide residency is questioned, but because they are recent rather than longtime residents.

Hall v. Beals, 396 U.S. 45, 53 (1969) (Marshall, J. dissenting). As the District Court below held (A. 48-49):

It is clear that, in actuality, Tennessee's interest in these matters is protected by the thirty-day period, and not by that State's durational residency requirements. Neither the purpose of, nor the justification

for, these latter requirements can be found in either the Tennessee Constitution or the Tennessee Code Annotated, and this court is of the opinion that they and not "necessary" to promote any "compelling state interest" and, indeed, serve no valid purpose.

4. Waiting Periods Do Not Meet the Test of Necessity in Furthering the Legitimate State Interest in Voter Identification.

Another function often suggested for justifying waiting periods for the exercise of the franchise is that of identifying voters in advance of the election, making the procedure on election day more efficient and less time-consuming. This function was once served by reference to real estate or tax records, see Macleod and Wilberding, **State Voting Residency Requirements and Civil Rights**, 38 GEO. WASH. L. REV. 93, 94 (1969), and now is adequately performed by Tennessee's registration provisions. See **State v. Weaver**, 122 S.W. 465 (1909).

The interest of the state is in indentifying bona fide residents, not in distinguishing newly arrived residents from those of long standing. As the Supreme Court said in **Shapiro v. Thompson, supra**, at 636:

The residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites. . . .

In Tennessee, there has evolved a very strict construction of the meaning of residence. In **Hascall v. Hafford**, 65 S.W. 423 (1901), the Supreme Court of Tennessee had to construe the meaning of residence in the context of a will contest. The deceased had lived in Tennessee for several years, working in the manufacturing business. His family stayed in Michigan so that his children could complete their education there, but his wife visited him

in Tennessee periodically. The deceased had voted in a primary election in Tennessee, and was elected alderman, though refusing to serve. The Tennessee Court, however, ruled that he was not a resident of Tennessee because evidence indicated that he considered himself a resident of Michigan: he had frequently stated this as a fact, and had refused to accept election as alderman on this basis. The Tennessee Supreme Court in **Brown v. Hows**, 163 Tenn. 178, 42 S.W. 2d 210 (1931) applied this strict definition in the context of voting. The Court held that residence mean domicile, an actual home fixed in any place without a present intention of removing therefrom. Thus, the mere act of abiding at a particular place for a specific purpose, with no present intention of making it a permanent home does not make of such place one's residence. The bare intent to make a particular place one's residence is not sufficient. There must be some appropriate action harmonizing with the intent. "To constitute domicile, two things must concur,—residence and intention to make it the home of the party. . . ." 42 S.W. 2d at 211-12.

The interest of the state in assuring that all its voters be identified as bona fide residents prior to the election is therefore adequately served by the application of its standards of residence in the registration process. Indeed, the statute itself, T.C.A., § 2-301, and the Tennessee Supreme Court, **State v. Weaver**, 122 S.W. 465 (1909), both state that one of the main functions of the registration of voters is for the identification of voters. Two years after Tennessee enacted its first universal voter registration law, there was a statewide constitutional convention. Despite the recent enactment of the universal registration procedure, there was no mention at all in the convention records concerning the possible impact the registration provisions might have on the continuing need for durational residency requirements. Indeed, the statewide waiting period has remained unchanged in the 100 years since its

inception in 1870. It is plaintiff's position that the waiting period requirement for voting is now a functionless, vestigial remnant which serves no purpose except to disfranchise a substantial number of otherwise qualified voters each year.²²

The Tennessee legislature in 1967 increased from 20 to 30 days the period of time before the election that registration would close. This represents its judgment as to the necessary time to serve the identification function. See District Court opinion, A. 48-49. In the 1970 Voting Rights Act, Congress similarly found that a 30-day period was sufficient to achieve the goal of voter identification. This conforms to the existing procedures in some four

²² It might be argued that while the durational residency provisions no longer serve any purpose in the larger metropolitan counties that they still are useful in the smaller, more intimate rural counties. When Tennessee entered the Union in 1796, it had a six-month county residency period. This can be explained in light of such cases as *State v. Oloksey*, 37 Tenn. 482, 487 (1858), as a measure to facilitate identification of bona fide residents. With the system of voter registration, the state in 1953 reduced the county waiting to three months in recognition that a longer period was no longer called for. But even this reduced length of time is no longer necessary in light of available alternatives. For example, under T.C.A. § 2-1309-1311, Tennessee allows for challenging the bona fides of a voter on election day. If Tennessee were fearful of intrusion in smaller counties, it could adopt a more formalized voter challenge procedure. See Note, *Protecting the Right to Vote: A Model Voter Challenge Statute*, 78 YALE L.J. 662 (1969); see *Keppel v. Donovan*, ... F. Supp. ... (D. Minn. No. 4-70 Civ. 423, Dec. 4 1970) (typed opinion at 12-13). Similarly, other provisions of the Tennessee Code provide for punishment for various types of voter fraud. See T.C.A. § 2-324, and there is no reason to believe that a potentially fraudulent voter, especially in a small county where discovery might be more likely, would risk up to a day shy of a year in prison so as to cast a single ballot. The provision of the Uniform Voting by New Residents in Presidential Election Act, 9C U.L.A. pp. 198-207 (1967 Supp.) present a whole range of enforcement devices which achieve the goal of deterring voter fraud more effectively and with less severe an impact on the eligibility of new residents to participate on an equal footing in the electoral process.

fifths of the states. See 116 Cong. Rec. 3543 (March 11, 1970). The additional durational residency provisions are surplussage in this regard, and therefore constitutionally impermissible. As Justice Brennan stated in **United States v. Arizona**, 91 S. Ct. 260, 322 (1970), there is "no evidence beyond the mere assertion that the scheme of § 202 is inadequate to protect against fraud. . . . Idaho has provided no explanation why the 30-day period between the closing of new registrations and the date of election would not provide, in light of modern communications, adequate time to insure against . . . frauds." As the Supreme Court said in **Shelton v. Tucker**, 364 U.S. 479, 388 (1960):

Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of the legislative abridgement must be viewed in the light of less drastic means for achieving the same purpose.

5. Waiting Periods Cannot Constitutionally Serve to Promote an Alleged State Interest in Identifying New Residents with the Interest of the State's Long-time Residents.

Another justification often cited for the existence of durational residency requirements for voting is the promotion of the state's interest in insuring a more informed electorate. Surely a state as a community has a certain interest in its election process. But if that interest is defined in terms of requiring of its voters "a period of residency sufficiently lengthy to impress upon them the local viewpoint," then the Supreme Court's decision in **Carrington v. Rash**, supra, at 94, clearly makes this an impermissible basis for a restrictive voter classification. **Hall v. Beals**, 396 U.S. 45, 53 (1969). (Marshall, J. dissent-

ing). Undoubtedly, local vested interests may wish to maintain their political control at the expense of newcomers whose political attitudes might not conform to those prevailing in the community. This alleged interest is based on what the members of the existing community would like the prospective voter's political interests and social values to be. Absent a question of a voter's intelligence and ability to perceive and understand political issues, this interest is not a constitutionally permissible basis of voter restriction, and in any event certainly is not a compelling interest.²³ In the 1970 Voting Rights Act, moreover, Congress specifically found that durational residency requirements which have the effect of denying citizens the right to vote because of the way they might vote are constitutionally impermissible. Section 202 (a) (4).

Voter restrictions aimed at insuring that the electorate have the capacity to understand and familiarize themselves with the candidates and issues, however, have been upheld, *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959) (literacy requirement valid), provided that they are applied in a non-discriminatory manner. *Louisiana v. United States*, 380 U.S. 145 (1965). Tennessee, however, has made no attempt to further its alleged interest in an informed electorate in this universally applicable, non-discriminatory way. Knowledgeability or competence has never been a criterion for participation in the electoral process for longtime residents. Instead, the state has chosen to discriminate against all new residents who do not meet either the one-year statewide or the three-month county waiting periods by conclusively presuming that they will not have the capacity to inform themselves about the candidates and the issues involved in the election. In the case of appellee herein, the Davidson County Election

²³ As Justice Marshall aptly observed, in *Evans v. Cornman*, 398 U.S. 419, 423: "All too often, lack of a 'substantial interest' might mean no more than a different interest . . ."

Commission expressly ruled knowledgeability or competency irrelevant.²⁴

In *Cook v. State*, 90 Tenn. 407 (1891), the Tennessee Supreme Court discussed its conception of the role of the waiting periods for voting:

These restrictions are terms of educational probation. . . . A native citizen or resident of any county cannot remove to another, however short the duration of removal, and be entitled to vote in the latter until he shall have been a resident citizen thereof for the period of six months. All this is to acquaint and identify him with the wants and interests of the people with whom he proposes to live. *Id.* at 510-11.

Another Tennessee Supreme Court decision, *State v. Cloksey*, 37 Tenn. 482 (1858), lends strong support to the hypothesis that the "educational probation" refers not to the legitimate objective of insuring the ability to understand issues but to the impermissible goal of "fencing out" those whose interests might jeopardize the status quo in the community. In *Cloksey*, a foreign-born person became a citizen of the United States shortly before an election. He had resided in the county for well over the six-month

²⁴ In *Shapiro v. Thompson*, 394 U.S. 618 (1969), Pennsylvania argued that the one-year waiting period for receipt of welfare payments served as a means of encouraging new residents to join the labor force promptly. "But this logic would also require a similar waiting period for long-term residents of the State. A state purpose to encourage employment provides no rational basis for imposing a one-year waiting-period restriction on new residents only." 394 U.S. at 637-38. Similarly, if Tennessee's argument that the durational residency requirement is to assure intelligent use of the ballot, it must show that it has attempted to serve this same interest vis a vis long-time residents as well. This the state has not done and cannot do. As the court in *Keenan v. Board of Law Examiners*, ... F. Supp. ... (E.D.N.C. 1970), said, "Too often, even lifelong residents of a community have no knowledge of even the basic rudiments of the governmental units closest at hand" (Typed opinion at 19).

waiting period, but when he attempted to vote as a citizen of the United States and Tennessee, he was disqualified. "A naturalized citizen is not legally qualified to vote until after a probation of at least six months from the time of his naturalization." *Id.* at 485. If the waiting period were aimed at insuring an informed electorate, the *Cloksey* decision does not make sense. If the restriction is viewed as a period of "indoctrination in local attitudes," *Hall v. Beals*, 396 U.S. 45, 54 (1969) (Marshall, J. dissenting), it becomes more easily understandable, and at the same time reveals a constitutionally impermissible basis for voter restrictions. A citizen's right to vote reflects his independent political preference; it is constitutionally permissible to require him to have the ability to make an informed choice, but it is not permissible for the state to impose on a bona fide resident a waiting period so that he can become indoctrinated with local political and social values. Cf. *Cook v. State*, *supra*.

There is a further flaw in the state's position that the waiting period requirement insures intelligent exercise of the franchise. This point was cogently brought out in the *Brief Amicus Curiae* for Bipartisan Committee on Absentee Voting at 4-8, 18-21, 33-35, in *Hall v. Beals*, 396 U.S. 45 (1969) [Hereinafter, Bipartisan Committee Brief]. As indicated *supra*, Tennessee defines residence as domicile for voting purposes. *Brown v. Howe*, 163 Tenn. 178, 182, 42 S.W.2d 210, 211 (1931); see also *Election Laws Work Document, Staff Draft for Law Revision Commission*, January, 1971 ("Resident" means domiciliary, proposed T.C.A. § 2-104(28)). This definition prevails in forty-six states. Bipartisan Committee Brief at 33. In this regard, it is important to realize that "domicile" typically does not require that a voter shall actually have been living in the state for one year, or in the county for three months before an election or at any previous time. Thus, since "residence" for voting eligibility rests upon

the intention of the voter to make his home in the state, manifested by some probative act of settlement there, mere absence from a domicile once established will not defeat the required "residence" if there is no intention to make the place of new abode permanent. Moreover, it is not necessary that a voter have been physically in residence in the state for the durational residency period, so long as his intention to make Tennessee his home was conclusively evidenced objectively by such an act as purchasing a home or establishing a business. See Bipartisan Committee Brief, 4-8. What this means, of course, is that the durational residency requirement, not requiring physical presence in the state, can in no way assure intelligent use of the ballot. Since the statute requires not presence in Tennessee but only domicile, the requirement that it have been established at a given point in time is no assurance of familiarity with candidates or issues. Bipartisan Committee Brief, at 18-19.²⁵

Another provision of Tennessee's voting laws is anomalous when viewed with regard to insuring knowledgeability about local political questions and guaranteeing a stake

²⁵ This point was rather graphically stated by the Georgia district court which invalidated that state's durational residency requirement for admission to the bar:

Equally unpersuasive is the argument that the residency waiting period enables the prospective attorney to absorb local legal practices. Having established residency and taken the bar examination, the applicant is not required to physically remain in Georgia prior to the fulfillment of his residency requirement. Having become a permanent resident he may decide to sojourn elsewhere. . . . The statute as drawn therefore serves absolutely no purpose save delay. Indeed, so far as appears, the applicant could remain in a self-induced coma for the entire period and still demand admission at the appointed time. A statute which permits such obvious discrimination and unequal treatment cannot be supported by such a slender and evanescent thread.

Webster v. Wofford, . . . F. Supp. . . . (N.D.Ga. 1970) (typed opinion at 5-6).

in local affairs. T.C.A., § 2-304 entitles a Tennessee resident who moves from one county to another within ninety days of an election to vote in his former district of registration. Typically, in a local primary, candidates may not announce ninety days prior to the primary. Nevertheless, a former resident of Shelby County (Memphis) who in May moved to Knox County (Knoxville), a distance of four hundred miles, would be eligible to vote in all of Shelby County's primary elections, including that for United States Representative from Memphis, but not the Representative from Knoxville. In terms of the objectives of promoting intelligent and responsible use of the ballot, it is impossible to reconcile the recent amendments to T.C.A. § 2-304.

In another light, however, T.C.A., § 2-304 becomes quite understandable. The recent amendment makes good sense if attention is directed away from local to statewide elections, or, to a case where a resident of one county moves to another county within the same legislative or Congressional district. The amendment reflects a feeling that loss of the vote merely because one changes his residence is unfair,²⁶ but because of the state constitutional provision here under attack, the legislature was unable to make a more rational accommodation of that political goal. Accordingly, the amendment to T.C.A., § 2-304 raises problems which would not arise but for the constitutional durational residency provisions. First is the problem already discussed: that residents who move to a different county

²⁶ The recent amendment to T.C.A. § 2-304 is commonly referred to as a "return-to-vote clause." Their origin seems to have been an attempt to mitigate the disfranchising effect of durational residency provisions. Even their success at achieving this goal has been far from overwhelming, however; in a state with a return-to-vote provision, unsatisfactory absentee voting provisions, for example, would result in significant disfranchisement of intercounty migrants. See generally Yates, *The Functions of Residence Requirements for Voting*, 15 W. POL. Q. 469, 470-73 (1962).

within ninety days of an election can participate in a constituency in which they no longer have any legitimate political interest and from whose political debates they are estranged. Second is the discrimination that the amendment makes against new residents—in our hypothetical, of Knox County—who come not from Memphis but from Lexington, Kentucky, a considerably shorter distance. These residents lose their vote entirely since they do not meet either the statewide or the county period. Absent the constitutionally imposed durational residency periods, Tennessee could undertake rationally to pursue the goal of enfranchisement that the amendments to T.C.A., § 2-304 indicate. New residents could be allowed to participate in their new community, where they have a stake, not in their former voting districts; and new residents from out of state would be able to participate on an equal footing with intrastate migrants. Of course, in the numerous states which do not have counterparts to T.C.A., § 2-304, the irrationality is even greater since no state can persuasively argue that the reason for a waiting period is to foster familiarity with candidates and issues when an intrastate mover is disfranchised even from statewide elections, or elections for legislature or Congress when a change of county residence does not mean a change of legislative or Congressional district.

6. Even if Waiting Periods Serve the Legitimate Purpose of Promoting an Informed Electorate, They Achieve This Goal by Overly Broad Restrictions on the Franchise, and Do Not Promote a Compelling State Interest.

As the Supreme Court said in *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959), “[t]he ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot.” White the state, therefore, does have a legitimate interest in

promoting the informed use of its electoral process, it cannot achieve this goal by restrictions on fundamental rights which sweep too broadly and do not meet the test of necessity. **Aptheker v. Secretary of State**, 378 U.S. 500, 508 (1964); **Shapiro v. Thompson**, 394 U.S. 618 (1969); **Kramer v. Union Free School District**, 395 U.S. 621 (1969). "Precision of regulation must be the touchstone in an area so closely touching on our most precious freedoms." **United States v. Robel**, 389 U.S. 258 (1967). As sweeping restrictions on the right to vote, and infringements on the right of travel, durational residency requirements are not narrowly enough confined to meet the limited goal of promoting intelligent voting.

Nor is the objective sought sufficiently compelling to warrant disfranchising such a significant proportion of otherwise eligible voters. The importance of the state's interest in guaranteeing an educated electorate has clearly been undercut by the enactment of the 1970 Voting Rights Act, in which Congress specifically prohibited the use of any test or device for insuring knowledgeability on the part of voters in local elections. Section 201(b) of the Act defines "test or device" as

any requirement that a person as a prerequisite for voting or registration (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

The policy behind this provision of the Voting Rights Act is that people should be allowed to vote even if they are not very well informed about political issues or candidates. Such lack of information should not serve as a bar into exercise of the franchise.

The literacy provisions of the 1970 Voting Rights Act, upheld unanimously by this Court in **United States v. Arizona**, 91 S. Ct. 260 (1970), apply to state and local elections as well as to all federal elections. To the extent that promoting an informed electorate is the legitimate interest the state purports to further by the durational voter residency provisions, the importance of the state's interest is severely undercut by the specific provisions of the Voting Rights Act. Congress has implicitly nullified **Lassiter**. Consequently, if durational residency be justified as a device designed to demonstrate competence, the goal may be constitutionally permissible but illegal nevertheless given **United States v. Arizona**, *supra*.²⁷

Appellee, and the class he represents, on the other hand, have vital interests at stake. Most important is appellee's right to vote in the elections for federal offices. See **United States v. Arizona**, *supra* (opinion of Black J.). The right to vote for United States Senator and United States Representative is derived from the seventeenth amendment and Article I, Section 2 of the United States Constitution, respectively. The right to vote for United States Senator and Representative is an important element of participation in the national political community. While Senators and Representatives speak for local constituencies, they also pass upon issues affecting every citizen irrespective of the particular locale wherein he resides. Any citizen, with appropriate powers of perception and interest, can inform himself on the position of a candidate within days of arrival in a state or district. Moreover, in the general election, a voter is often concerned in large measure with the party for which he casts his ballot. In the Congress, control of the administrative

²⁷ The fact that Tennessee, subsequent to the 1970 Voting Rights Act, can no longer permissibly use a test of competence on new residents does not undercut appellee's assertion that this procedure is not used under Tennessee law and has never been.

machinery, including the all-powerful committee chairmanships, goes to the majority party. Therefore, every citizen has a vital interest in the party composition of Congress. Can Tennessee forcefully contend that the newly-arrived citizens who participated in the November, 1970, elections could not obtain sufficient information to distinguish intelligently between former Senator Gore and Senator Brock? Can Tennessee persuasively argue that citizens who travel interstate, or intrastate, have no legitimate interest in which party will control the Speakership in the House of Representatives? the leadership in the Senate? the chairmanship of all Congressional committees? Does a citizen, just because he exercises his constitutional right to travel by changing his residence, forfeit all legitimate interest and effective influence over whether Carl Albert or Gerald Ford becomes Speaker of the House? whether or not J. William Fulbright retains the chairmanship of the Senate Foreign Relations Committee? whether or not John Stennis keeps his position as Chairman of the Senate Armed Services Committee? whether or not Emmanuel Celler stays on as Chairman of the House Judiciary Committee? And yet each Senator or each Representative has a vote in determining the makeup of these important leadership positions. Appellee submits that the mere posing of these questions is a sufficient illustration of the abiding interest that appellee and those in the class he represents have in the composition of Congress, and that Tennessee's disfranchisement of this class works an invidious discrimination against its members for no constitutionally justifiable or compelling reason.

The fact that the right to vote in statewide elections is not derived from the federal constitution does not diminish the importance of that interest for plaintiffs and the class he represents. **Reynolds v. Sims**, 377 U.S. 533 (1964). The Governor, members of the State Legislature, and other

statewide officials perform important functions in the administration of state government. While there may be no inherent right to vote for any of these officers, see **Fortson v. Morris**, 385 U.S. 231 (1966), once the franchise is granted, restrictions on its exercise may only be made where necessary to promote a compelling interest. **Kramer v. Union Free School District**, 395 U.S. 621 (1969). Given the policy of Congress in abolishing any knowledgeability requirements for elections, 1970 Voting Rights Act, *supra*, the state can cite precious little to justify the extraordinary disfranchisement imposed on bona fide residents who do not meet the one-year or three-month waiting period requirements. The burden of justification is on the state since "matters close to the core of our constitutional system" are involved, and the state "may not casually deprive a class of individuals of the vote because of some remote administrative benefit." **Carrington v. Rash**, 380 U.S. 89, 96 (1965). Indeed, even in terms of administrative convenience, the standard adopted by the district court, consistent with the federal standard in presidential elections, avoids maintaining multiple registration books especially is this true in light of **United States v. Arizona**, *supra*.²⁸

²⁸ In the wake of **United States v. Arizona**, *supra*, the State of Tennessee is obliged to maintain separate registration lists: one for federal elections, in which eighteen year olds are eligible; and one for state and local elections, in which the minimum age is twenty-one. To alleviate this administrative headache, a constitutional amendment lowering the voting age to eighteen in all elections passed the Congress and now has been ratified by more than twenty states. If this amendment should become adopted, dual registration will no longer be necessary in Tennessee because, under the order of the district court, the standards for eligibility in presidential elections, as far as durational residency is concerned, are the same as for all elections. Were the district court judgment to be overturned, Tennessee, like other states which would still have longer durational residency periods than those provided in the 1970 Voting Rights Act, would have to maintain a dual set of books. And if the eighteen year old vote amendment should not be ratified, the potential

On the one hand, the State of Tennessee has the burden of justifying its restrictive classification, and this it cannot do. On the other hand, the interests of plaintiff and the class he represents, are fundamental. Modern communications enable voters to become aware of political issues much more quickly than when durational residency requirements were first enacted. The candidates for statewide office receive daily, in-depth coverage on radio, television, and in the newspapers. Any living being who watched television could hardly have avoided Messrs. Hooker and Dunn at least twice a night on all three major Nashville television stations. Each day, **The Nashville Tennessean** devoted a substantial amount of front-page space to the gubernatorial campaign. The same is true of other newspapers throughout the state. Moreover, the campaign did not begin formally until well after the one-year and three-month cut offs were long past. What compelling interest does the State of Tennessee have in requiring its voters to reside in the state or the county for a period before the beginning of the actual campaign?

Clearly, if any interest of the State can be labeled compelling, it is the interest in acquainting voters with purely local issues. Nevertheless, appellee contends that there is no necessary or compelling interest for restricting the right to vote of appellee, and the class he represents, even in local elections.

for chaos would increase if the district court is not upheld. In such a situation, Tennessee would have to maintain not two but three separate registration lists: longtime residents, over 21, eligible for all elections; longtime residents between 18-21, eligible only for federal elections; new residents over 18, eligible only for Presidential elections. That this administrative inconvenience is no small matter is quite clearly evidenced by the willingness of state legislatures, under pressure from the secretaries of state, to ratify the eighteen year old vote amendment when, within the past few years the voters themselves expressly declined to lower the voting age to eighteen. Tennessee and New Jersey are two such examples.

On the arguable assumption that requiring acquaintance with local issues is a valid state objective, it is first important to realize that this in no way justifies the imposition of the one-year statewide waiting period requirement for voting. Cf. **Burg v. Canniffe**, 315 F. Supp. 380 (D. Mass. 1970). As the court in **Burg** observed, such a distinction between interstate and intrastate movers cannot be justified on the basis of promoting "intelligent use of the ballot." **Lassiter v. Northampton Bd. of Elections**, 360 U.S. 45, 51 (1959). Even for the limited purpose of restricting the franchise in local elections, however, the three-month waiting period does not support a compelling state interest.

Reference to data regarding the educational profile of recent movers into Davidson County indicates the insubstantiality of the interest the state purports to further in acquainting new residents with the local issues and candidates. Of the population age 25 and over, which moved into Davidson County in 1955-60, approximately 31.4% had finished some college.²⁹ Of the same age group already residing in Davidson County prior to 1959, only 14.2% had finished some college.³⁰ Of the movers, 56.3% were high school graduates; of the non-movers, only 36.7% had completed four years of high school.³¹ Conversely, of the movers, 43.7% did not finish high school; of the non-movers, however, 63.3% did not make it through high school.³² Clearly, the mobile population is

²⁹ U.S. Bureau of Census. U.S. Census of Population: 1960. Subject Reports, Mobility in Metropolitan Areas. Final Report PC (2)-2C. Table 4, at p. 160.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.* It should be noted that this figure understates the magnitude of the disparity. The data cover the age group of 25 and over, thereby excluding an important element of the mobile population which would be highly educated—namely college students, graduate and professional students, and those who are recent graduates.

characterized by consistently higher levels of education in all categories. On the assumption that educational achievement bears some relationship to one's ability to understand issues and become acquainted with candidates' political stances, it would appear that Tennessee is disfranchising not the least likely people to be informed voters, but a class characterized by higher levels of education and therefore more likely to cast an intelligent vote.

Moreover, there is evidence to show that of the 26,942,000³³ eligible voters who did not cast ballots in the 1968 presidential election, those barred by durational residency requirements (11%)³⁴ had higher levels of education. Of those who did not vote for reasons other than durational residency restrictions, 50.5% were high school graduates, 38.9% had finished eight years of elementary education or less, and 10.7% had completed some college.³⁵ Of those who could not vote because they failed to meet some durational residency requirement, 66.1% were high school graduates, 15.8% had finished eight years of elementary education or less, and 27.9% had completed some college.³⁶ The figures indicate that the population disfranchised involuntarily because of various durational residency requirements is more highly educated than other non-voters. Thus the impact of the restrictions is felt most by

our better educated and more responsible citizens—
people with the initiative and character needed to
pull up stakes and seek advancement in a new com-

³³ U.S. Bureau of Census, *Current Population Reports*, Series P-20 No. 192, "Voting and Registration in the Election of November 1968", Table 16 at p. 47. U.S. Government Printing Office, Washington, D.C., 1969.

³⁴ *Ibid.*

³⁵ *Id.*, Table 17, at p. 49.

³⁶ *Ibid.*

munity. Schmidhauser, **Residency Requirements for Voting and the Tensions of a Mobile Society**, 61 Mich. L. Rev. 823 (1963), citing Byrne, **Let's Modernize our Horse-and-Buggy Election Laws**, in The Center for Information on America⁴ (1961).

These figures on the educational background of the mobile population are helpful in this context in showing that the interest that the state purports to further-promoting an intelligent electorate at the local level—is not a compelling interest given the capability of the mobile population to learn about political issues and candidates quickly. Moreover, the fact that the 1970 Voting Rights Act specifically eliminates knowledge about local matters as a permissible criterion for disfranchisement reduces the importance of the interest the state asserts in this regard. In all cases, therefore, the interest the state purports to further is insubstantial, and certainly far from compelling. In any event, the method used to promote the interest is not designed with the necessary precision to distinguish among those new residents who could qualify under this neutral principle and those who could not.³⁷

³⁷ That this overinclusiveness violates even traditional equal protection standards, is made clear in **Turner v. Fouche**, 396 U.S. 346, 391-64 (1970), where the Court held a limitation of school board membership to freeholders invalid explicitly under **Fouche**, the Court stated that “[h]owever reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that the quality is necessarily wanting in all citizens of the county whose estates are less than freehold.” 396 U.S. at 364. Similarly, Tennessee may not presume that all new residents, and only new residents, are lacking in the competence to exercise the franchise intelligently. Whatever objectives Tennessee “seeks to obtain . . . must be secured . . . by means more finely tailored to achieve the desired goal.” *Ibid.*

II. Even Under the Traditional Equal Protection Standard, Tennessee's Durational Residency Provisions Are Unconstitutional Because They Bear No Rational Relationship to Any Legitimate Governmental Interest.

Tennessee's durational residency provisions create two classes among bona fide residents with respect to voting eligibility: those who have satisfied both the one-year statewide and three month county requirements, and those who have failed to meet one or both of these requirements.

The only distinction between these classes of bona fide residents is the length of time they have been domiciled in the state. There is no requirement that a resident physically reside in the state for the durational period, provided that he established domicile far enough in advance. See Bipartisan Committee Brief, *supra*. Indeed there is no requirement that a domiciliary even be present in the state for any period of time in order to vote by absentee ballot. T.C.A. 2-1602. Thus, the sole basis of classification is whether a Tennessee resident has exercised his constitutionally protected right of interstate travel.

Once a disadvantageous classification has been shown, it becomes the duty of the state under traditional review to furnish a legitimately defensible difference. In order to satisfy the reduced burden of justification under the traditional equal protection standard, the state must show (a) that it has a legitimate policy goal it is seeking to promote, and (b) that there is a rational relationship between the end sought and the means to that end chosen. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

Dandridge v. Williams, 397 U.S. 471 (1970), in which this Court upheld state maximum welfare grants to large families, and *Turner v. Fouche*, 396 U.S. 345, 361-64 (1970), in which this Court invalidated a provision which limited membership on a school board to freeholders, serve as

starting points for analysis of traditional equal protection review. In **Dandridge**, Justice Stewart for the Court found that the concept of "overreaching" had no place because the issue dealt with "state regulation in the social and economic field," 397 U.S. at 484. The Court's reluctance to impose rigid constitutional controls on social experimentation reflects a sober lesson from history when the Court struck down social welfare laws it thought unwise or improvident. *Id.* at 485. The Court therefore declined to find that the state regulation, which did promote the objectives of encouraging employment and avoiding discrimination between welfare families and the working poor, violated equal protection:

Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.

397 U.S. at 487.

Quite clearly, the kind of decision the Court was faced with in **Dandridge** was one whose policy component was paramount. Once the Court agreed that it was not its business to determine what percentage of a state's budget was to be allocated to welfare—the value judgments which underlay that choice are most evidently political—it faced an almost impossible task of evaluating different policy choices for dividing up the given welfare "pie".³⁸

³⁸ This is what Ely, *supra*, would label a "discretionary goal." Arguably, a state must have broad discretion in achieving vague social welfare objectives without having to pass strict constitutional scrutiny since it cannot justify any single policy choice as necessary to promote a given objective. Who is to say whether the general welfare is better served by a scheme which favors large families at the expense of lower benefits for all others, or a scheme which imposes a maximum grant on large

The same complexity was not present in *Turner v. Fouche*, *supra*, where the Court was faced with the more direct question whether a state can limit school board membership to freeholders. The Court found it unnecessary to determine whether strict equal protection review was applicable because "the Georgia freeholder requirement must fall even when measured by the traditional test for a denial of equal protection: whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective." 396 U.S. at 362. Cf. *Cipriano v. City of Houma*, 395 U.S. 901, 707 (1969) (Black and Stewart, J. J. concurring). In the instant case, Tennessee cannot rationally classify on the sole basis of recent interstate travel without making an attempt to isolate the operationally relevant factors to voting competence. Presumably, the state would not argue that duration of residence, of itself, is an indicator of anything at all, save mobility. It must be an inference from this mobility that causes the state to disfranchise these new residents. But the state has not introduced a shred of evidence to justify the inferences that it apparently draws: that new residents are likely to commit fraud, or that they are unable to exercise the franchise intelligently.

In *Turner v. Fouche*, the Court observed:

It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property if he is to participate responsibly in educational decisions, without regard to whether he is a parent with children in the local

families allowing others to have higher benefits? This is difficult for the Court to decide as a constitutional issue, a determination reflected in Justice Stewart's opinion. The determination in the voting durational residency situation is much more straightforward: whether a state may rationally presume that new residents as a class (a) cannot make intelligent use of the ballot or (b) will commit voter fraud. Cf. *Turner v. Fouche*, 396 U.S. 346, 364 (1970).

schools, a lessee who effectively pays the property taxes of his lessor ~~as part~~ of his rent, or a state and federal taxpayer contributing to the approximately 85% of the . . . annual school budget derived from sources other than the board of education's own levy on real property.

396 U.S. at 363-64. Similarly, with respect to durational residency for voting, it is irrational for a state to impose a waiting period on all its new inhabitants alike whether they physically reside in the state or not; whether or not they are willing to sign a forfeiture of previous voter registration; whether or not they, like appellee, are willing to make a showing of competence. Again as the Court noted in **Turner**,

Nor does the lack of ownership of realty establish lack of attachment to the community and its educational values. However reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that that quality is necessarily wanting in all citizens of the county whose estates are less than freehold.

396 U.S. at 364. Tennessee may presume that longtime residents have a modicum of knowledgeability about political issues, but see **Keenan v. Board of Law Examiners**, *supra*, at 19, and it may even assume that longtime Tennesseans will not commit voter fraud, but it may not rationally presume, as the state's brief intimates that it does, that appellee will not "cast his ballot fairly" and will "interfere with others by fraud, force or duress." **Appellants' Brief**, at 9.

Thus, from **Turner v. Fouche**, *supra*, it is clear that even where there is some connection between a statutory distinction and a readily ascertainable and easily defined state objective, a statute discriminates invidiously if the connection is tenuous in the extreme: While there may be a rational relationship between property ownership

and interest in local affairs, there is no rational relationship between lack of property holding and lack of community ties. Consequently, even under traditional review, Tennessee must tailor its means more precisely to achieve its limited objectives. There is no question of balancing a multiplicity of values; either the state can conclusively infer from mere interstate migration that appellee is unable to vote intelligently or that he will commit voter fraud, or it must devise other means of ascertaining answers to these legitimate questions. The relevance of alternatives to standard equal protection review is clear from **Turner**:

Whatever objectives Georgia seeks to obtain by its "freeholder" requirement must be secured, in this instance at least, by means more finely tailored to achieve the desired goal.

396 U.S. at 364.³⁹

In **Shapiro v. Thompson**, *supra*, although the Court explicitly found strict review applicable, Justice Brennan made it clear that upon analysis, the durational residency provisions there under review were invalid under traditional standards as well: "Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional."

³⁹ The **Turner** approach to traditional review was used in **Keenan v. Board of Law Examiners**, *supra*, at 20-21:

Therefore, while the one year residency requirement may deny licenses to some applicants who lack character or competence, it also bars, arbitrarily and capriciously, applicants who are eminently qualified for admission. Its constitutional infirmity is "over inclusion" [citations omitted]. It burdens some who, because of unfitness or incompetence, should not be licensed to practice; but it also injures others who are both fit and capable. There are here no exigent circumstances justifying such over inclusion. . . . [W]e find a denial of equal protection of the laws in the Board's presumption that all those who have not been residents of North Carolina for more than one year preceding their bar examination should be classified unfit.

394 U.S. 638. The Court in **Shapiro** was faced with a state argument that the durational residency requirement prevented fraud, but the Court rejected this outright: "The argument that the waiting period serves as an administratively efficient rule of thumb for determining residency similarly will not withstand scrutiny." *Id.* at 636. **Accord:** **Harman v. Forssenius**, 380 U.S. 528, 542-43 (1965). In the instant case, there are numerous other ways in which a prospective registrant's bona fides may be verified. The voter registration system itself, as the district court found, is expressly designed to serve this function, and it came into being well after the enactment of the state's durational residency provisions. The proposed new T.C.A., § 2-221, is another way of insuring that new registrants do not maintain dual registration. See Election Laws Work Document, Staff Draft for the Law Revision Commission, January, 1971. T.C.A., § 2-324, imposes a criminal sanction for various nefarious practices with respect to the franchise. The state could formalize its voter challenge system, T.C.A., § 2-1309-1311, pursuant to recommendations in Note, **Protecting the Right to Vote: A Model Voter Challenge Statute**, 78 YALE L.J. 662 (1969), or adopt any of the numerous recommendations of The Uniform Voting by New Residents in Presidential Elections Act, 9C U.L.A., pp. 198-207 (1967). The durational residency requirements are really not effective for preventing voter fraud, see **Hall v. Beals**, 396 U.S. 45, 54-55 (1969) (Marshall, J. dissenting), especially where, as here, there seems to be no attempt by the state to go beyond the mere assertion on the registration affidavit.

As for the purported interest of the state in promoting intelligent use of the franchise, it will be helpful to examine some of the literature available on geographic mobility. A report of a project recently supported by a grant from the Welfare Administration of the Department of Health, Education and Welfare, concluded that:

Mobility rates are highest for young adults and fall off rapidly as older age groups are considered. Mobility rates are much higher for those with a college education than those with only a grade school or high school education. The differences in mobility rates as between those with a grade school education and those who have been to high school are small but on the average the latter are more mobile. Highly trained people are likely to move because their specialized services are in demand in a different area. Young people are likely to move because it is easier and less expensive for them, and because they have not yet developed specific knowledge which is useful in particular jobs in particular areas but may be less useful elsewhere.

. . . Most people in the labor force give job-related economic reasons for their moves. The people with the strongest economic position in terms of skill level and education seem particularly likely to respond to economic incentives such as the opportunity for a better paying job. . . .

LANSING AND MUELLER, THE GEOGRAPHIC MOBILITY OF LABOR
335-36 (1967).

The pattern of discrimination is clear: those kept from the voting rolls because of durational residency provisions are those most responsive to economic incentives. They are highly skilled, highly educated, and tend to be young adults. The data presented by Norling are consistent with the Lansing and Mueller study. Norling shows that there is a steady, unvarying relationship that as people have higher education, a higher percentage of the group is disfranchised annually by waiting periods. His data indicate that while 54.2% of all resident voting age citizens are high school graduates, 66.0% of those disfranchised by residence requirements are high school graduates, and while 10.0% of all resident voting age citizens are college

graduates, 15.7% of those disfranchised by residence requirements are college graduates. **Norling** at 6-7. 1971 data from the Census Bureau support these conclusions. Of the population 25 years of age and over, 53.9% of non-migrants (that is, those who have not moved intercounty or interstate within the last year)⁴⁰ had at least a high school education whereas 69.2% of all migrants had at least a high school education. (Of the migrants, 62.9% intrastate migrants had at least completed high school, and 75.7% of interstate migrants had at least completed high school.) Similarly, only 23.9% of non-migrants had at least one year of college, whereas 40.0% of all migrants had had at least one year of college. (32.5% of intrastate migrants had at least one year of college, and 47.6% of interstate migrants had at least one year of college.) 1971 **Census Population Characteristics**, Table 4, p. 12.

If durational residency requirements discriminate on the basis of age and education, the relevant inquiry becomes what their effect is on the ability to exercise the franchise intelligently. Young adults have often been accused of low rates of participation in the electoral system. But the data presented by **Norling** are germane in this regard. While 9.1% of the resident citizens of voting age are between 21 and 24 years old, 23.3% of those disfranchised by durational residency requirements are in this age group. **Norling** at 10. 25.9% of 21-24 year olds could not register because of waiting period restrictions, but only 10.2% of those over 64 were thus disfranchised.⁴⁰ Thus,

⁴⁰ Percent of Unregistered Citizens of Voting Age Disfranchised by residence requirements in 1966, by age

21-24	25.9
25-34	26.4
35-44	20.8
45-54	16.3
55-64	14.0
65 +	10.2
Total	20.4

Source: Recomputed from data in **Current Population Reports**, Series P-20, No. 174, Table 9, Cited in **Norling** at 10.

while the evidence does support the conclusion that voter participation does increase by age steadily until age 65, the trend is rendered less significant when the discriminatory aspect of durational residency requirements is considered.

While age may be a neutral factor with respect to political participation and therefore community involvement,⁴¹ the same is not true of education. "A trend for those with higher education to be more likely to participate in politics has . . . been found in many Western countries." MILBRATH, POLITICAL PARTICIPATION 122 (1965). Thus, more highly educated people tend to become more involved in formal and informal networks within the community. This involvement indicates an identification with the community and an active involvement in its political and civic life. It is this kind of involvement which is what the state must have in mind when it refers to intelligent exercise of the franchise. Those participating actively in the formal and informal networks and organizations within a community are those most likely to be informed about issues and candidates. To be sure, within each educational group, participation seems to increase with the time spent in the community, but there is such a substantial overlap between new residents of high education and natives of low education that classification on the basis of duration of residence is irrational. For example, in one study, 47% of college-educated migrants, in their new community for less than two years, belonged to formal organizations within the community. As this group of college-educated persons remained in the community up to 10 years, the rate of participation increased to 58%. But, and this is the crux of the irrationality, when the college-educated group which resided in the community for less than two years is compared with high school edu-

⁴¹ "[P]ersons who are active in community affairs are more likely than those not active to participate in politics" MILBRATH POLITICAL PARTICIPATION 17 (1965).

cated natives, it becomes clear that education, and not duration of residency, is the factor which is the most important indicator of involvement. Natives with only a grade school education had a participation rate of only 33%, and those with a high school education had a rate of 50%. This means that the college-educated person, in less than two years, attains a participation rate almost equal to the native with lower education. Similar findings were shown for occupational groups. White collar workers in the community for less than two years showed a participation rate of 33%, while native manual workers had a rate of 32%. And of course, migrants tend more often to occupy white collar jobs. See Zimmer, "Participation of Migrants in Urban Structures", reprinted in Jansen (ed.), *READINGS IN THE SOCIOLOGY OF MIGRATION* 74-75 (1970).⁴² See generally Guliek, Bowerman, and Back, "Newcomer Enculturation in the City: Attitudes and Participation", reprinted in Chapin and Weiss (eds.), *URBAN GROWTH DYNAMICS IN A REGIONAL CLUSTER OF CITIES* 315, 357 (1962).

⁴² Zimmer at 74.

Table I. Per Cent Belonging to Formal Organizations Within Age, Occupational, and Educational Categories, by Length of Time in Community

Length of time in community (years)	Age		Occupation		Education		
	Under 40 yrs. 40 yrs. plus	WC	MW	GS	HS	Col	
Less than 2	25 ^a	22	33	16	5	10	47
2-5	37	36	53	22	15	37	54
6-10	45	31	46	35	18	42	58
11-19	50	40	67	30	29	49	60
20 and over	.. ^b	51	73	37	35	47	92
Natives	56	54	63	48	33 ^c	50	74
Total	41	42	56	32	24	41	61

^a The complement of this percentage would be the percentage of those who do not belong.

^b Less than 10 cases.

^c Less than 20 cases.

From the data, then, one cannot but conclude that the discrimination wrought by the durational residency provisions works to the detriment of the political system by disfranchising not those who are likely to be uninformed, cf. **Harper v. Virginia Bd. of Elections**, 383 U.S. 663, 674, 684-85 (1966) (Black, J. dissenting; Harlan, J. dissenting), but the very people who are most likely to make intelligent, responsible use of the ballot. Since voter participation is related to involvement in the community, there is in effect a self-screening mechanism. To the extent that a new resident is well enough aware of the registration cut off date, and is concerned enough to present himself at the registrar, wait in line for as long as three or four hours, and possibly miss part of a day at work, and then repeat this election day, it is likely that he is substantially concerned about the outcome of the election. Especially in a society where so much of a campaign is conducted through the media (newspapers, radio and television), where the candidates do not announce until well after the one year cut off period, and the issues do not crystallize until the weeks just before the election, it is unrealistic to seriously contend that new residents as a class are unable to participate intelligently in the electoral system. The discrimination is invidious and violates equal protection of the laws.

III. The Tennessee Durational Residency Requirements for Voting Violate Procedural and Substantive Due Process of Law

- A. Tennessee's durational residency requirements for voting conclusively presume appellee's unintelligent or fraudulent use of the franchise and violate due process for failure to allow rebuttal of these empirical assumptions which are not reasonably related to the legislative objective sought.

Elsewhere, appellee has demonstrated that the state can achieve any of its legitimate objectives by less drastic infringements on appellee's right to vote. Appellee has also shown the lack of a rational connection between duration of residency and voting competence. By legislating a conclusive presumption of political ignorance or of voting duplicity, the state has deprived the entire class of new residents of any opportunity to rebut these factual assumptions. In this manner, all new residents are classified solely on the basis of membership in this class. "If the rule be expressed as a presumption . . . it is a conclusive one." *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952). The result of this legislative scheme is to deny to new members a hearing as to the applicability of the presumption to their case.

In *Boddie v. Connecticut*, 91 S.Ct. 780, 785 (1971), this Court recently held that "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." This principle is not limited to access to the courts; in *Boddie*, the Court was careful not to create a right of access to the courts, but relied instead on the pivotal role that the state had taken for itself by monopolizing an avenue of conflict reso-

lution. No better description could be found for the political system; it is the ultimate and exclusive source of power through which final decisions which vitally affect the lives of all citizens are made. Thus, whenever fundamental rights are involved, there must be an "opportunity for hearing appropriate to the nature of the case," and it must be "granted at a meaningful time and in a meaningful manner." *Id.* at 786. Cf. **Goldberg v. Kelley**, 397 U.S. 254 (1970); **Sniadach v. Family Finance Corp.**, 394 U.S. 337 (1969).⁴³

Because of the absence of procedural safeguards, conclusive presumptions which have a substantial adverse impact on the exercise of constitutional rights are not looked upon with favor by the courts. **Aptheker v. Secretary of State**, 378 U.S. 500 (1964); **Carrington v. Rash**, 380 U.S. 89 (1965); **United States v. Robel**, 389 U.S. 258 (1967); **Leary v. United States**, 395 U.S. 6 (1969). Thus, in **United States v. Provident Trust Co.**, 291 U.S. 272, 281-82 (1933), this Court, in invalidating a conclusive presumption, observed that

[t]he rule in respect of irrebuttable presumptions rests upon grounds of expediency or policy so compelling in character as to override the generally fundamental requirement of our system of law that questions of fact must be resolved according to the proof.

The Tennessee durational residency requirements for voting establish an irrebuttable presumption that appellee, and members of the class he represents, cannot qualify to participate in the state's electoral process, much as Texas forbade "a soldier . . . to controvert the presumption of non-residence." **Carrington v. Rash**, *supra* at 96.

⁴³ In the instant case, appellee attempted to use the hearing provided by Tennessee to introduce evidence of competence, but this was deemed irrelevant by the Davidson County Election Commission. See A. 8.

There is no reason for Tennessee to exclude new residents from its eligible electorate solely because they are recent arrivals. Indeed, such a purpose would be constitutionally impermissible as a penalty on the right of free travel. **Shapiro v. Thompson**, 394 U.S. 618, 631 (1969); **United States v. Jackson**, 390 U.S. 570, 581 (1968). There must be some other basis on which to explain the restrictive classification. It must stand as a surrogate, a proxy, for some other concern of the state. In serving this role, if acts as a conclusive presumption, and must be analyzed constitutionally as such, regardless of whether it is conceptualized as a rule of evidence or a substantive principle of law.

[W]hether the . . . presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to exist in actuality. . . . This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment.

Heiner v. Donnan, 285 U.S. 312, 329 (1932).

In **Heiner v. Donnan**, 285 U.S. 312 (1932), the Supreme Court said that failure to give a party an opportunity to amass facts that show the irrationality of a statutory presumption violated due process. The Court noted that medical science had advanced, and assumptions that might once have been reasonable could no longer withstand analysis, given the more sophisticated medical knowledge available when the case was decided. Cf. **Manley v. Georgia**, 279 U.S. 1, 6 (1928). In **Leary v. United States**, 395 U.S. 6 (1969), this Court specifically stated that the determination of a presumption's constitutionality is a highly empirical matter.

A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling on such a challenge a Court must, of course, be free to re-examine the factual declaration.

395 U.S. at 38, n. 68. In **Leary**, Justice Harlan cited evidence that marijuana grew in great quantities in the United States and used this to show the irrationality of a presumption that mere possession of marijuana was presumptive of illegal import. Cf. **Tot v. United States**, 319 U.S. 463 (1943). Similarly, in **Chastleton Corp. v. Sinclair**, 264 U.S. 543 (1924), this Court, through Justice Holmes, held that an emergency ordinance enacted in the District of Columbia, which had earlier been sustained, had to be re-examined given the changed circumstances. Once the reason for the emergency provisions lapsed, of necessity so did the power to enact such regulations. Likewise the durational residence requirements for voting must be re-examined in the light of new circumstances, and individual members of the class must at least be given an opportunity to show the inapplicability of the presumption to them.

Because of the procedural defects of conclusive presumptions, they have received notoriously inhospitable treatment by courts. For example, Selective Service regulations establish a conclusive presumption that mailing a form shall constitute notice to a registrant of the contents of the communication, "whether he actually receives it or not." 32 C.F.R., § 1641.3. In **United States v. Bowen**, 414 F.2d 1268 (3rd Cir. 1969), the Third Circuit found this irrebuttable presumption unconstitutional as a violation of due process to the extent that it made rebuttal evidence irrelevant. Even in an area where the conclusive presumption has been the most deeply embedded into our jurisprudence—the question of legitimacy when a child is conceived during a marriage in which husband and wife

were cohabiting—courts have permitted introduction of evidence when it is unreasonable to allow the conclusive presumption to prevail. See generally Comment, **California Conclusive Presumption of Legitimacy—Its Legal Effect and Its Questionable Constitutionality**, 35 So. CAL. L. REV. 437 (1962). As the Idaho Supreme Court recently observed, "the more modern doctrine is that the presumption of legitimacy of a child conceived in wedlock may be rebutted by proper and sufficient evidence." **Alber v. Alber**, 472 P.2d 321, 325 (1970). Indeed, it appears that only two states still retain the conclusive presumption of legitimacy when husband and wife are cohabiting, see 19 HAST. L.J. 963-64 n.5 (1968), despite the serious consequences which attach to illegitimacy.

Perhaps the leading case discussing this presumption of legitimacy is **Matter of Findlay**, 253 N.Y. 1 (1930), an opinion written by Chief Judge (later Justice) Cardozo. After setting out the facts of the case, Cardozo states:

Potent, indeed, the presumption is, one of the strongest and most persuasive known to the law . . . , and yet subject to the sway of reason. Time was . . . [i]f a husband, not physically incapable, was within the four seas of England during the period of gestation, the court would not listen to evidence casting doubt on his paternity. The presumption in such circumstances was said to be conclusive. . . . Since then the presumption of legitimacy, like other presumptions, such as those of regularity and innocence, has been subject to be rebutted. . . .

Id. at 7. At one point it might have been rational to presume conclusively that new residents were incapable of intelligently exercising the franchise, or were likely to commit voter fraud, but no such assumption is warranted in a highly mobile society in which communication is largely through the mass media. It is a violation of due

process to establish by legislative fiat, especially in the face of both data and common sense, that new residents make incompetent electors.

One argument that is sometimes made against invalidation of conclusive presumptions is that they are in fact legal fictions. For example, in **Heiner v. Donnan, supra**, the policy of the statute involved was aimed at taxing gifts given in contemplation of death. There was established a conclusive presumption that any gifts made within two years of death was made in contemplation of death. The Court struck this down as a violation of due process because it was unfair to deny a hearing on the question of whether the gift in fact was made in contemplation of death. The presumption and the fact presumed were not inextricably linked.

Some critics, however, have taken the position that it is wrong to analyze a statute of that type in terms of presumptions because it would have been rational for the legislature to tax all gifts made within two years of one's death, regardless of whether the gift actually was in contemplation of death. Consequently, so the argument goes, the court should look beyond the presumption. In cases of the kind described, it might be permissible to tax all gifts made within a specified period before one's death, since there might be independent policy reasons for such a provision. The regulation would then have to stand or fall on the reasonableness of those goals. Cf. Morgan, **Federal Constitutional Limitations Upon Presumptions Created by State Legislation**, in **HARVARD LEGAL ESSAYS** 323, 328-330, (1934). Here, however, the policy objectives articulated by the state for the durational residency requirements are specifically those for which the durational periods serve as proxy. The state does not even suggest that it could disfranchise new residents solely because they have recently moved interstate, and clearly any such at-

tempted justification would be impermissible as aimed at those who have exercised their federal rights of interstate migration. **Shapiro v. Thompson, *supra*; United States v. Jackson, *supra*.** Consequently, the only way that the state can justify the waiting periods are as proxies for other factual assumptions, and in this role the waiting periods are nothing else but conclusive presumptions and should be analyzed under due process as such. Therefore, even the criticism which has been applied to this Court's action invalidating conclusive presumptions is inapplicable to the present case.

Although the District Court found that the state's interest in a knowledgeable electorate was neither demonstrated nor legitimate (given the literacy test ban of the 1970 Voting Rights Act), the state asserts that the durational residency provisions promote the intelligent use of the ballot. As the lower court found, however, the state can point to no other example of where it attempts to promote this same interest vis a vis longtime residents. Instead, the state selects an arbitrary group on which to impose this alleged knowledgeability standard, without even affording members of the group an opportunity to prove the state wrong factually.

The State has mustered no evidence to show that interstate movers, as a group, are less well informed than non-movers. Nor has there been any showing that new residents, as a group, actually know less about the issues or candidates involved in an election, provided they establish residency while the registration books are still open (30 days before election day). See discussion, *supra*. In short, the state has made no showing of any empirical evidence to support the conclusive presumption which the durational residency requirement enforces (See **Skinner v. Oklahoma**, 316 U.S. 535, 545 (1942) (Stone, C. J. concurring)). On the other hand, there is strong evidence to rebut the state's empirical position. The revolution in

communications with the development of radio and television has facilitated the flow of information in a manner unforeseeable in 1796, when the county waiting period was first enacted, or in 1870, when the statewide waiting period was adopted for the first time. At a time when direct broadcast from the moon is a reality, it seems anachronistic to assume that the only way to learn about political issues and candidates is by physical presence in a place for one year or three months. Perhaps "against the backdrop of mid-nineteenth century circumstances, residency requirements were well-conceived," but "[i]n light of a mid-twentieth century perspective . . . [they] . . . are obsolete." Macleod and Wilberding, **State Voting Residency Requirements and Civil Rights**, 38 GEO. WASH. L. REV. 93, 95 (1969).⁴⁴

Therefore, since there is no demonstrated, or demonstrable nexus between length of residency and ability to cast an intelligent vote, since there is no opportunity at a hearing to present contrary evidence, and since the deprivation of the rights of appellee and other members of his class by the conclusive presumption is extreme, the durational

⁴⁴ The California Court which invalidated that state's durational residency requirement for voting makes the point well:

The formal channels of voters' education and information are immeasurably wider and more numerous than they were almost a century ago. The wealth of information available from newspapers (which frequently give elaborate summaries a few weeks before elections), as well as that which is presented by radio and television, exceeds beyond description that which was available in 1879. Even the telephone, although patented in 1876, was virtually unknown in a practical way here. . . . It is hardly necessary to make reference to the immense growth of higher education and secondary education in the ninety-one year period. It is to be noted, too, that voters of whatever length of residency in the state cannot have information about some important issues until a time much less removed than one year from the election. They learn who are the candidates for state election (and sometimes for other offices, including judgeships) only after the primary elections.

Keane v. Mihaly, 90 Cal. Rptr. 263, 266-67 (1970)..

residency provisions with respect to voting are unconstitutional as a violation of due process under the fourteenth amendment.

B. Tennessee's durational residency requirements for voting violate due process as overbroad restrictions on the fundamental rights of political association and interstate travel

The substantive component of the due process clause suggests another analytical approach to constitutional cases involving individual liberties. See **Boddie v. Connecticut**, 91 S. Ct. 780 (1971). Concurring in **Williams v. Illinois**, 399 U.S. 235, 259 (1970), Justice Harlan stated: "I, for one, would prefer to judge the legislation before us in this case in terms of due process, that is to determine whether it arbitrarily infringes a constitutionally protected interest of this appellant." Cf. **Williams v. Rhodes**, 393 U.S. 23, 41 (1968) (Harlan, J. concurring).

Under a due process analysis, the Court must frankly weigh the competing interests in favor of the disadvantageous classification against the constitutionally guaranteed interests of the class harmed by the restrictive provision. Among the factors which must be considered are the following: the nature of the individual interest affected; the extent to which it is affected; the rationality of the connection between the legislative means adopted and the legislative purpose; the existence of alternative means for effectuating the articulated legislative goal; the degree of confidence that the statute reflects a legislative concern for the purpose that would legitimately support the means chosen by the state. **Williams v. Illinois**, *supra*, at 260 (Harlan, J. concurring). Tennessee's durational residency provisions cannot withstand analysis with respect to any of the enumerated factors relevant under the due process approach.

1. The Right to Vote Is a Fundamental Right, Preservative of All Other Rights

a) The Right to Vote Is an Integral Element of the Political Freedom Guaranteed by the Rights of Speech, Press, Assembly and Petition.

The basic function of the guarantees of speech, press, assembly, association, and petition is to protect the political freedom of citizens from erosion by governmental action. Inherent in the democratic process is the assumption that political expression must be protected as a means of channeling conflict resolution into the political arena, thereby avoiding other forms of conflict. See, e.g., Tennessee Constitution, Art. I, Sec. 2.

"Élections are institutional procedures for choosing officeholders. In a larger sense, they are also exercises in mass communication. The web of federal and state voting statutes, woven on the framework constructed in 1787 and altered occasionally by constitutional reform delineates the network through which the voice of the people can be heard."

R. CLAUDE, THE SUPREME COURT AND THE ELECTORAL PROCESS 1-2 (1970).

It is precisely this right to be heard that of necessity links voting to the first amendment guarantees. It is through exercise of one's right to press, right to speech, right to petition, and right to assembly that the citizen makes his voice heard. The "market place of ideas" serves as an effective forum for effectuating the necessary compromises that must be forged to maintain a viable democratic society. "No right is more precious in a free country than having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights even the most basic are illusory if the right

to vote is undermined.” **Wesberry v. Sanders**, 376 U.S. 1, 17 (1964).

Thus, the first amendment freedoms are not ends in themselves, but are protected as a preferred method of resolving political conflict. In **Williams v. Rhodes**, 393 U.S. 23 (1968), the Court asserted that the right of political association for advancement of political beliefs was illusory without the concomitant power to transform political beliefs into political acts through the voting process. Justice Harlan, concurring specially, solely on first amendment grounds, noted that the state had not directly limited the right to assemble or discuss public issues, but by denying any opportunity to participate in the presidential selection procedure, the state infringed on important substantive rights. “The right to have one’s voice heard and one’s views considered by the appropriate governmental authority is at the core of the right of association.” 393 U.S. at 41 (Harlan, J. concurring). Therefore, if the right to vote were not constitutionally guaranteed, the rights of speech, press, assembly, association, and petition could be reduced by the states to a right to engage in futile rhetoric.

Indeed, the right to vote is . . . central to the First Amendment. As a comprehensive charter of freedom of political expression, that Amendment embraces not only the rights specifically enumerated, but also those additional rights necessary for their full exercise and enjoyment. See, e.g., **NAACP v. Alabama**, 357 U.S. 449; **NAACP v. Button**, 371 U.S. 415, 429-430. Voting is indisputably a form of political expression—for most people, the only practical form. The difficulty experienced by persons denied their proper vote in general elections in securing a remedy for that condition in the political arena is, indeed, one of the principal reasons why the Court has insisted upon the

more stringent rule of review regarding voting matters. **Reynolds v. Sims**, *supra*, 377 U.S. at 544-555; **Kramer v. Union Free School District**, *supra*, 395 U.S. at 639-640 (dissent).

Brief for the United States, at 30-31 n. 22, **United States v. Arizona**, 91 S.Ct. 260 (1970).

Consequently, the rights of speech, press, assembly and petition do not operate in a vacuum: Rather they are rights designed to guarantee that the people may be heard effectively. **Amalgamated Food Employers Union Local 590 v. Logan Valley Plaza, Inc.**, 397 U.S. 208 (1968).

The rights are not limited to mere statement of facts but necessarily entail "the opportunity to persuade to action." **Thomas v. Collins**, 323 U.S. 516, 537 (1945). The first amendment is the vehicle designed to effectuate the underlying premise that government is "responsive to the will of the people." **Stromberg v. California**, 283 U.S. 359, 369 (1931); **Roth v. United States**, 354 U.S. 476, 484 (1957). In a representative democracy, "the whole concept of representation depends upon the ability of people to make their wishes known to their representatives"—to persuade elected officials to enact legislation.

Eastern R. R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961). Ballots are the means used to express one's view about a political figure and to remove him from office. **New York Times v. Sullivan**, 376 U.S. 254, 299 (1964) (Goldberg, J., concurring). The selection of candidates is a form of "expression of the voice of the people." **McPherson v. Blacker**, 146 U.S. 1, 26 (1892).

Voting is the final and authoritative act of political expression and is essential to the security and efficacy of the first amendment freedoms. It is implicit in the first amendment. As the Court stated in **Hadnott v. Amos**, 394 U.S. 358, 364 (1969) ". . . First Amendment rights

include the right to band together for the advancement of political beliefs." And clearly these first amendment rights have always been deemed fundamental. *Williams v. Rhodes*, 393 U.S. 23 (1968).

b). The Exercise of the Franchise Is a Fundamental Right Embodied in the Concept of Due Process of Law.

The Due Process Clause is the vehicle provided by the Constitution to insure that fundamental fairness is accorded citizens in their relationship with their government. The Due Process Clause accommodates the Constitution, as originally drafted, with subsequent amendments including the "broad principles announced in the Fourteenth Amendment, generations later." *Williams v. Rhodes, supra*, at 43 (Harlan, J., concurring). Thus, "[t]he State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due." *Boddie v. Connecticut, supra*, at 787 (1971).

The right to vote is the keystone of that institution, called government, which houses the rules by which society governs its affairs. At the core of a representative form of government is the association of individuals into a body politic. *Williams v. Rhodes, supra*, at 41 (Harlan, J., concurring). Thus, the Mayflower Compact read (1620): "We . . . doe by these presents solemnly & mutually in the presence of God, and one another, covenant & combine our selves togeather into a civill body politick, for our better ordering & preservation & furtherance of the ends aforesaid. . . ." Mayflower Compact in 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS, 106-07 (Z. Chafee, Jr. ed.) (Atheneus ed. 1963).

The underlying basis of this conception of government is the necessity of securing consent of the people. As Locke, to whom the Framers of the Constitution looked, expressed:

And thus every man, by thus consenting with others to make one body politic under one government, puts himself under an obligation to everyone of that society to submit to the determination of the majority and be concluded by it; or else this original compact, whereby he with others incorporates into one society, would signify nothing and be no compact, if he be left free and under no other ties than he was in before in the state of nature.

J. LOCKE, THE SECOND TREATISE OF GOVERNMENT (1764) (1952). "When any one or more shall take upon them to make laws, whom the people have not appointed so to do, they make laws without authority, which the people are not therefore bound to obey." *Id.* at 120. Article 21 of the Universal Declaration of Human Rights explicitly recognizes the importance of the right of the people to exercise effective political influence:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage.

This very concept of the right to be heard was recently recognized in another context by this Court in **Boddie v. Connecticut**:

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling

them to govern their affairs and definitely settle their differences in an orderly, predictable manner. Without such a legal system; social organization and cohesion are virtually impossible; with the ability to seek regularized resolution^r of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the 'state of nature'."

91 S. Ct. at 784.

In **Boddie**, the issue was access to the judicial system by people who were reliant upon it for resolving their conflict. The Court emphasized that the situation of divorce was special because the state had monopolized the avenues by which this disharmony could be dealt with. But, having created exclusive control over this form of resolving conflicts, the state incurred an obligation to members of society to make access to this system available to those who could not otherwise afford participation in the state-established process.

The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain. But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' rights. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy.

Boddie v. Connecticut, supra, 91 S. Ct. at 785. Thus, since dissolution of a marriage could only be achieved through the courts, the state's duty was analogized to

its duty to defendants in the criminal process. And, as recognized by Justice Harlan, concurring in *Williams v. Rhodes*, *supra*, 393 U.S. at 42 “[t]he requirement imposed by the Due Process Clause remains the same—no matter what the institution to which the decision is entrusted, political groups have a right to be heard before it.”

When the judiciary is the exclusive path for settling personal conflicts, the state's monopolization imposes on it certain responsibilities that the system be made reasonably accessible. Similarly, in the political arena, it is the electoral process which is the last resort for those who seek to effectuate their political platforms. *Williams v. Rhodes* is clear recognition that states do not have unfettered power in restricting political groups from this electoral system.⁴⁵ Just as unreasonable restrictions on

⁴⁵ Dissenting in *Boddie*, Justice Black argues that states have virtually plenary power in the area of divorce. Similarly, one could argue that the tenth amendment grants to the states plenary power to set voter qualifications. Of course, this Court's great voting rights decisions of the last decade, and the *White Primary Cases* over 30 years ago, negate this position. But, even assuming that Justice Harlan, in *United States v. Arizona* is correct that equal protection is not a restriction on state power to set voter qualifications, the argument fails in two ways. First, the Court recognized in *Boddie* that due process applies even where states have wide discretion. As Justice Harlan noted in *Williams v. Rhodes*, while equal protection might not be applicable to election qualifications, it is “perfectly consistent and appropriate to hold the Due Process Clause applicable,” 393 U.S. at 43. Second, the argument ignores the final phrase of the tenth amendment. As originally introduced by Madison, the tenth amendment read: “The powers not delegated by the Constitution, nor prohibited by it to the States, are reserved to the States respectively.” During the debates in the House of Representatives on August 18, 1789, Representative Carroll proposed that the phrase “or to the people” be added at the end of the amendment. His amendment was accepted and became part of what is now the tenth amendment. This history of the addition to the tenth amendment takes some force away from the argument that the tenth amendment grants all retained powers to the states. In the Constitutional Convention, there constantly was drawn a distinction between the States and the People, and the compromise which established the bicameral national legislature is an example of the result of

access to the courts constitute a threat to their legitimacy as final arbiters for resolving conflict—especially where the state has shut other avenues for possible solutions—unnecessary roadblocks to the political system undercut its legitimacy and abridge important associational freedoms.⁴⁶

this conceptual difference. Clearly, the last phrase must have some meaning. It was not qualified "or to the people of the several states," cf. Art. I, § 2; and consequently must mean the people of the United States. In the context of durational residency requirements for voting, this final phrase should be seen as undercutting the power of states to disfranchise citizens of the United States solely for exercising rights secured by the federal Constitution—the right to reside in any state one wishes unencumbered by civil or political disabilities.

⁴⁶ Certainly, voters who, solely because of their recent interstate migration, cannot participate, are every much as aggrieved as minor party followers were in Ohio in *Williams v. Rhodes*. If it be suggested that new residents are only excluded for a single year, it could be argued that there was no absolute bar to the ballot in Ohio at all. It was quite apparent that Mr. Wallace was going to run for the presidency several years prior to the November 1968, election. Nevertheless, his supporters made no realistic effort to comply with the time requirements of the Ohio statutes. But, for the Court, the important factor was the encumbrance placed on associational freedoms, with the realization that voters were entitled to have reasonable access to the political forum for any given election. Consequently, the argument that appellee should be patient, foregoing the 1970 elections, must fail. The decisive year for George Wallace might have been 1968, and his followers had a constitutionally protected interest in being able to make their political choice known through the state-controlled monopoly governing political decision-making—the electoral system. Similarly, in 1970 in Tennessee, a very important election for Senator took place. Those new residents who wanted to "get Albert" had a significant stake in whether former Senator Gore should be returned to the Senate as Tennessee's representative, and those, on the other hand, who wished to have him remain in the Senate, with all his accumulated seniority, would have been irreparably harmed if they had not been able to participate in the 1970 election. Even, hypothetically, if former Senator Gore could run again in 1972, it is unquestionably true that, stripped of his seniority, he would not be the same Senator as if he had been reelected. It is incorrect, therefore, to view the interests of new residents as less significant than those of the Wallace backers in *Williams v. Rhodes*; the associational elements in both situations are very similar.

The concept of political legitimacy has a long history in the United States. One of the battle cries of the Colonists who broke with the Mother Country was "No taxation without representation." This, in slogan form, was a challenge to the legitimacy of the constituted political authority of England. In this sense, the legitimacy of democratic and republican government depends upon its responsiveness to the expression of consent and dissent of the governed. This principle guided Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316 (1819), where this Court invalidated a state tax imposed on a United States bank. The "security against the abuse of the power"—that is, the power to tax—was the "structure of the government itself." *Id.* at 428. As a state, Maryland was able to tax its own citizens since the political leaders were responsive to the people of the state; however, Maryland was attempting to tax a broader constituency—the United States—without the inherent check against abuse that responsiveness to those taxed brings about. This taxing power, consequently, was deemed illegitimate.

Over time, conceptions of legitimacy change. At one time, it was thought permissible, within a representative democracy, to restrict the suffrage to male property holders and systematically to exclude sizable groups on the basis of race. But since the Civil War, notions of legitimacy have dictated the inclusion of a broader constituency in the process of political decision-making. Six constitutional amendments have directly advanced the right of the people to vote over this period. Section two of the fourteenth amendment placed a federal sanction against states denying the right to vote to any inhabitants over 21 years of age; the fifteenth, nineteenth and twenty-fourth barred denial of the franchise on bases of race, sex or wealth, respectively; the seventeenth required the popular election of United States Senators; while the

twenty-third extended the right to vote for President to the District of Columbia. Thus, through amendment, suffrage has become a right of age, residence and citizenship, and not of property, race, sex, or occupation.

2. State Exclusion of New Residents from the Franchise Directly Impinges on Federally Guaranteed Rights of Interstate Migration.

Recent federal legislative action in supporting expansion of the franchise indicates the increasing national concern with disfranchisement of significant sectors of the population. Thus the 1965 Voting Rights Act recognized the importance of power at the polls as a source of political strength for blacks in the South. Similarly, the national concern expressed in the amendments to the 1970 Voting Rights Act indicate that restrictions on the franchise are no longer of purely local concern. This is especially true where the bases for classifications are not primarily local factors, but factors which apply on a national scale. The durational residency provisions are classic examples of where the exercise of federally protected rights—interstate migration—is the sole basis upon which disfranchisement rests. Cf. **Slochower v. Bd. of Higher Education**, 350 U.S. 551 (1957). Fundamental fairness dictates that a person, guaranteed the right to take advantage of economic opportunities in any state in the United States, not suffer political disabilities exclusively because he took advantage of a chance to move.

While the eligible political constituency has normally been expanded by constitutional amendment or legislative action, “[c]ourts become involved as well. Their role has been to oversee the definition and realization of the rights of political participation . . .” Claude, **Nationalization of the Electoral Process**, 6 HARV. J. LEGIS. 139, 145 (1969). In the case of durational residency restrictions on the ballot, members of the larger constituency—citizens of the

United States—are exercising rights guaranteed by the Constitution of the United States; but, as Justice Stewart pointed out in **United States v. Arizona**, it is unlikely that the individual states will have any incentive to include these newcomers into their political system. 91 S.Ct. at 345-46, 348. It is for this reason that federal action, "to vindicate the unconditional personal rights secured to the citizen by the Federal Constitution," 91 S.Ct. at 348 is required "if this privilege is to be effectively maintained." *Ibid.* While the federal constitution may not of itself guarantee the right to all to participate, the importance of the vote for legitimacy of the political process, coupled with the undoubted federal interest in safeguarding interstate mobility, establish a case under due process that the states cannot disfranchise new residents solely on the ground that they are recent arrivals. Such arbitrary discrimination effectively furthers no state policy objectives, on the one hand, but, on the other, severely limits the rights of appellee and the class he represents to an unimpeded choice of homesite and concomitantly diminishes the legitimacy of the political process of both the state and federal governments.

3. New Residents Are Subject to All Laws of the State of Tennessee, but May Be Effectively Excluded From Political Influence Well Beyond the Duration of the Waiting Period.

Appellee has shown that the interests at stake in his disfranchisement, on any hierarchy of values, are the most basic to an ordered society. The substantiality of the deprivation cannot be gainsaid. In 1970 appellee was deprived of the right to vote in the primary of his choice. In that election, at the state level, candidates were chosen to represent their respective parties in the race for Governor, United States Senate, Public Service Commission, United States House of Representatives, State Senate,

State House of Representatives, and State Party Committeemen and Committeewomen. Appellee lost the right to participate in the August General Election in the selection of one Justice of the State Supreme Court, four Judges of the State Criminal Court of Appeals, three Judges of the Court of Appeals, one Judge of the General Sessions Court of Davidson County, the Public Defender of Davidson County, and delegates to the State Constitutional Convention. Judges are elected in Tennessee to serve for eight year terms. See, Tennessee Constitution, Art. VI, §§ 3, 4. Thus, in the August, 1970, elections alone, appellee lost his right to vote for eight years, not one, and this despite the fact he was and is a bona fide resident of the State of Tennessee and had filed suit at the earliest possible time after exhausting his administrative remedies. Had appellee been deprived of the right to vote in November, he would have lost the opportunity to vote for one U.S. Senator for six years, one Public Service Commissioner for six years, the Governor of Tennessee for four years, and his Congressional Representative for two years.

Nevertheless, as in *Evans v. Cornman*, 398 U.S. 419, 424 (1970), appellee is immediately subject to the full panoply of Tennessee law. As a resident, without regard to duration, he must obtain a motor vehicle operator's license, T.C.A., § 59-704, and must transfer his automobile registration to Tennessee, T.C.A., § 59-401. He must pay income tax on stock dividends, T.C.A., § 67-2601, and if he should die, he would be subject to the broader coverage of taxation which applies to residents without regard to duration of residency. T.C.A., § 30-1601-1602. Indeed, the definition of "person" in T.C.A., § 67-2601 illustrates the dual standard applied to exercise of the franchise and obligations imposed by the state for taxation purposes:

Any person who has a legal domicile in Tennessee shall be subject to the tax hereby imposed; every person who maintains a place of residence in Tennessee for more than six (6) months in the tax year

shall be subject to the tax hereby imposed, regardless of what place such person may claim as a legal domicile.

Consequently, the burdens of citizenship are imposed on new residents, and in all other respects they are treated alike, but with respect to the vote, they are discriminated against on this basis alone.

4. Reasonable Alternatives Exist for Effectuating the State's Articulated Legislative Goals.

Having established the importance of the interests at stake and the substantiality of the deprivation, it remains to consider the availability of alternative measures by which the state can achieve its asserted policy goals.⁴⁷ There is no need to recapitulate the arguments in the sections on equal protection. The conclusions there reached indicate clearly the availability of alternative means of thwarting voter fraud and assuring intelligent use of the ballot. Suffice it to outline here the penalties that currently exist under Tennessee law to deal with voter fraud. T.C.A., § 2-324 makes it a criminal offense "for any person to register or to have his name registered as a qualified voter . . . when he is not entitled to be so registered, . . . or to induce or procure any other person to register or be registered as a voter when such person is not legally qualified to be registered as such. . . ." T.C.A., § 2-1614 states that "[i]t shall be a felony for any person who, for any reason, is not legally entitled to vote at the time and place where he votes or attempts to vote under this chapter, to vote or offer to do so; and it shall be a felony for any person to aid or abet another in voting illegally or offering to do so, with knowledge of such illegality. . . ." T.C.A., § 2-2207 makes it a misdemeanor "for any person knowingly to vote in any political convention

⁴⁷ The irrationality of the durational residency requirements in promoting any state interest was shown in the equal protection argument, and will not be repeated here.

or any election held under the Constitution or laws of this state, not being legally qualified to vote. . . ." T.C.A., § 2-202 makes it a criminal offense to vote outside the ward or precinct where one resides and is registered. Under T.C.A., § 2-2208, it is a misdemeanor for any person "to procure, aid, assist, counsel or advise another to give his vote in any convention, primary or final election, knowing such person is disqualified." Finally, and most significantly with respect to the state's colonization argument, is T.C.A., § 2-2209:

Fraudulent voters brought from another state.—If any person bring or aid in bringing any fraudulent voters into this state for the purpose of practising a fraud upon or in any primary or final election, such person shall, upon conviction, be imprisoned in the penitentiary not less than two (2) nor more than five (5) years.

Thus, through its criminal law, Tennessee has comprehensively dealt with the evils it purports to further through the broad political disability—the durational residency requirement.⁴⁸ Moreover, the Law Revision Commission is currently under charge by the legislature to codify the voting laws, and there is no question that the issue of fraud will be a major concern. Proposed § 2-221, discussed, *sapra*, is an example of the sensitivity of the Commission to the problems alluded to in the state's brief.

⁴⁸ The only additional protection afforded by a durational residency requirement is the protection of the state from those voters willing to commit perjury on the question of residency but unwilling to do so on the question of durational residency. "The requirement of the additional element to be sworn—the duration of residency—adds no discernible protection against 'dual voting' or 'colonization' by voters willing to lie." *Hall v. Beals*, 396 U.S. 45, 54 (1969) (Marshall, J. dissenting). The unnecessary disfranchisement of voters is indeed ironic; for Tennessee, in the name of purifying the ballot, deprives a substantial number of bona fide residents of any participation at all in the political process. Surely this "cure" is worse than the "disease."

5. Tennessee Must Not Unduly and Unnecessarily Infringe on Fundamental Rights of Political Association and Interstate Travel in Achieving Its Legislative Objectives.

The last issue to consider, now that the competing interests have been set out, is how the balancing is to work. The due process counterpart of the equal protection "test of necessity" is that where basic freedoms are involved, a state cannot promote its articulated goals by broad restrictions on individual liberties. See *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."); *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964) ("[T]he Constitution requires the powers of government 'must be so exercised as not, in attaining a permissible end, unduly to infringe' a constitutionally protected freedom.") This principle has been referred to as the "less drastic means" doctrine. It amounts to judicial limitation on policy alternatives available to government for achieving its objectives when the means chosen by government impinge on basic freedoms, like the political association implicit in participation in the electoral process, *Williams v. Rhodes*, *supra*, and the right of interstate travel. *Shapiro v. Thompson*, *supra*, *United States v. Guest*, *supra*. Under these circumstances—especially where, as here, the means chosen by the government is at best tangentially related to its articulated objectives—the Court will remand to the legislature so that it can fashion some other method of achieving its goals without sweeping broadly over basic individual liberties. Once this duty of the state is recognized, the balancing becomes straight-forward. On the one hand, the state has an interest in promoting intelligent use of the franchise and preventing voter fraud. The state, however, also has interests in maintaining the legitimacy of its political process. Individuals who migrate interstate have a constitutionally cognizable interest in

establishing new residence without political or civil disabilities, and the federal constitution protects the broader constituency of citizens of the United States from parochial discrimination against them on the basis of exercising a federal right. Moreover, the state has made no showing that it would be hard pressed to achieve its goals in other ways, and appellee has demonstrated how the state currently does promote the same interests more effectively through the criminal sanction, and through the voter registration system. Consequently, upon any candid balancing giving due recognition to the importance of the interests involved and the insubstantiality of the state's interest in the particular measure under attack, the interests of appellee and his class must prevail.

CONCLUSION

Because the waiting period for voting violates both the equal protection and due process guarantees of the fourteenth amendment, and because the opinion of the District Court is supported by the weight of authority, this Court should affirm its judgment in all respects.

Respectfully submitted

JAMES F. BLUMSTEIN

Appellee—Pro Se

Vanderbilt Law School

Nashville, Tennessee 37203

Of Counsel

CHARLES MORGAN, JR.

NORMAN SIEGEL

American Civil Liberties Union Foundation, Inc.

5 Forsythe St., N.W.

Atlanta, Georgia 30303

JERRY P. BLACK, JR.

4517 Harpeth Hills Drive

Nashville, Tennessee 37215

APPENDIX

TENNESSEE'S DURATIONAL RESIDENCY REQUIREMENTS FOR VOTING CONSTITUTE A PENALTY ON THE EXERCISE OF THE FUNDAMENTAL RIGHT OF INTERSTATE TRAVEL

It might prove helpful to discuss the interpretation of the term "penalty" as used in footnote 21 of *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) in more general terms than in the body of this brief. Clearly, one form of "penalty" is where there is a punitive intent. This variety of "penalty" serves the purpose of either vengeance or deterrence. See generally, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). It should be clear that the kind of penalty referred to in the *Shapiro* footnote is not of this type. Cf. *Speiser v. Randall*, 357 U.S. 513 (1958).

The type of penalty alluded to in *Shapiro* is quite different. Its function is to determine when a fundamental constitutional right is abridged so as to require the application of strict equal protection review. The finding of penalty, in this situation, is not the end of the constitutional analysis; it merely determines the kinds of interests at stake, indicating to the Court whether the classification serves to abridge fundamental rights. Whether this abridgment is ultimately unconstitutional depends upon the equal protection analysis used when fundamental rights are affected—that is, whether the state can justify the disadvantage imposed on those solely because they have exercised a fundamental right on the ground that the restriction promotes a compelling interest. "In this context 'penalty' is not restricted to fine or imprisonment. It means . . . the imposition of any sanction which makes assertion of the . . . privilege 'costly.'" *Spevack v. Klein*, 385 U.S. 511, 515 (1967).

Thus, the threshold question in determining the applicability of strict review is whether a disadvantage has been imposed by a classification solely because a constitutionally protected right has been exercised. Any showing of a disadvantageous distinction will place on the state a burden of justifying that the classification serve a legitimate policy goal and that the means adopted to promote that objective be rationally related to its achievement. What the additional requirement—that there be demonstrated a penalty on the exercise of a constitutionally protected right—means is that strict equal protection review is triggered only where the disadvantageous distinction comes about solely because the disadvantaged class has exercised a basic constitutional freedom. In these cases, the content of the burden of justification is that the restriction be necessary to promote a compelling state interest.

In order to place the burden of justification on the state, the complainant need prove nothing about the likely statistical impact of the distinction; that is, he need make no showing concerning the . . . traits possessed by those it is likely to affect. The only impact he must show is that he will be disadvantaged relative to one or more other persons. . . . Nor, of course, is he obligated to prove anything concerning the motivation of those who made the choice.

. . . [N]o demonstration of likely effect is needed to move the case to the justification stage, to force the government to defend the choice under attack. The simple existence of the distinction is sufficient to do that.

Ely, Legislative and Administrative Motivation in Constitutional Law, 79 YALE L. J. 1205, 1228-29 (1970) (emphasis in original). Consequently, if the state must justify any disadvantageous classification without a demonstration of adverse impact or improper motivation, it stands

to reason that the content of the burden of justification should not be determined by reference to such factors, but only to the characteristics of the rights being impinged upon. It is in this light that the meaning of penalty in the **Shapiro** footnote must be understood.

Sherbert v. Verner, 374 U.S. 398 (1963) is a good example of constitutional analysis similar to that in the instant case. **Sherbert** has been criticized on very special grounds which relate to the interface between the free exercise and establishment clauses of the first amendment, but this has no analytical relevance for our purposes. See generally Ely, *supra*, at 1319-22. In **Sherbert**, a South Carolina statute conditioned unemployment compensation to a worker's availability for work which the state defined as a willingness to work six days a week (Monday through Saturday). On this basis, a Seventh Day Adventist was denied unemployment compensation because of her refusal to accept employment on Saturday, her Sabbath. Even though the classification in **Sherbert** did not depend solely on her religious belief—this would be the closest analogue to classification on the basis of recent interstate migration and clearly a much stronger case for Mrs. **Sherbert**—the Court invalidated the restriction because it constituted a penalty on her free exercise of religion. The test established by Justice Brennan, writing for the Court, parallels the test set forth in the **Shapiro** footnote, with the substitution of the word "infringement" for "penalty":

If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest" . . .

Sherbert v. Verner, *supra*, at 403. As to whether the unemployment compensation disqualification imposed a burden on appellant's free exercise of religion, the Court found that it did even though the consequence was "an indirect result of welfare legislation within the State's general competence to enact . . ." *Ibid.*

In **Harman v. Forssenius**, 380 U.S. 528 (1965), the Court struck down as a penalty on the exercise of Twenty-fourth Amendment rights a Virginia statute which required a federal voter to file a certificate of residence in each election year six months prior to election day if he chose not to pay a poll tax.

It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution . . . "Constitutional rights would be of little value if they could be . . . indirectly denied," . . . or "manipulated out of existence" . . . [Citations omitted].

Thus, in order to demonstrate the invalidity [of the Virginia procedure], it need only be shown that it imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax. [The Virginia procedure] unquestionably erects a real obstacle to voting in federal elections for those who assert their constitutional exemption from the poll tax.

. . . Any material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban.

Harman v. Forssenius, *supra*, at 540-42. The applicability of **Harman** to the classification on the basis of recent interstate migration embodied in Tennessee's waiting period for

voting is direct. Not only does the durational residency provision impose a "material requirement," it imposes an absolute prohibition based solely on the exercise of the right of free interstate movement. Clearly, the meaning of penalty in *Harman* is applicable to the footnote in *Shapiro*.

In *United States v. Robel*, 389 U.S. 258 (1967), the Court invalidated a statute prohibiting members of "Communist-action" organizations from working in defense facilities. The Court noted that

"[t]he Government has insisted that Congress . . . has not sought to punish membership in 'Communist-action . . . organizations'. . . Rather, the Government asserts, Congress has simply sought to regulate access to employment in defense facilities. But it is clear the employment disability is imposed only because of such membership."

United States v. Robel, *supra*, at 265 n. 13. It is clear from this statement in *Robel* that the Court was concerned about the basis of the classificatory principle and not upon the motivation of Congress. Just as membership triggered the disability and consequently was deemed a penalty, recent interstate migration in the instant case *per se* results in the voting disability. It is for this reason that strict equal protection view is triggered, with the content of the burden of justification being the showing of overriding state interest.¹

¹ In *Robel*, the government argued that there was no constitutional right to work in a defense plant, and on this basis sought to distinguish *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). In *Aptheker*, the Court invalidated a statute which denied a passport to all members of a Communist organization actually registered or under a final order to register with the Subversive Activities Control Board. The Court found that the statute unnecessarily impinged on the fundamental right of international travel:

The restrictive effect of the legislation cannot be gainsaid by emphasizing, as the Government seems to do, that a

Examination of several criminal procedure cases may also prove helpful in showing that neither impermissible motivation nor actual deterrence are necessary features of a "penalty" as used in the *Shapiro* footnote. In *Griffin v. California*, 380 U.S. 609 (1965), this Court invalidated a California procedure which permitted a trial judge to instruct the jury that a defendant's failure to testify may properly lead to inferences harmful to defendant's case. As this Court noted, judicial comment "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion

member of a registering organization could recapture his freedom to travel by simply in good faith abandoning his membership in the organization. Since freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association.

378 U.S. at 507. In *Robel*, the Court admitted that the disability imposed was to limit employment opportunities, not the same value constitutionally as international travel. "But the operative fact upon which the job disability depends is the exercise of an individual's right of association, which is protected by the provisions of the First Amendment." 389 U.S. at 263. Thus, even if one takes the position that determination of qualifications for voting is a state matter, the reasoning of *Robel* requires that the state justify its classification as precisely tailored to promote an overriding interest. The Court acknowledged that under the war power, Congress had wide latitude. "However, the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.'" 389 U.S. at 263-64. Similarly, state's rights cannot blithely be understood to justify any discrimination in the distribution of the franchise. If Congress must abstain from needlessly penalizing associational freedoms, even in defense facilities, it follows that Tennessee must refrain from unnecessarily penalizing the right of interstate travel, even if it normally has broad powers to determine voter qualifications. *Lassiter v. Northampton Board of Elections*, 360 U.S. 45 (1959); *Carrington v. Rash*, 390 U.S. 89 (1965); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Evans v. Cornman*, 398 U.S. 419 (1970).

costly." 380 U.S. at 614. If deterrence from claiming the privilege were the primary concern of the Court, it would have required that a trial judge instruct the jury that defendant's silence must be disregarded, but this the Court expressly declined to do. 380 U.S. at 615 n. 6. A defendant may be less likely to remain silent if a jury, even without instruction from the trial judge, may draw the "natural and irresistible" adverse inference. But as a matter of law, the mere failure to testify—a constitutionally protected privilege—cannot, of itself, serve as a legal basis for disadvantageous inferences. Similarly, in the case of durational residency requirements for voting, the status of being a new resident, based as it is solely on the exercise of a constitutionally protected right, cannot of itself serve as the ground for voting disqualification, unless necessary to promote a compelling state interest.

That disabilities cannot be imposed solely because one has exercised a constitutionally protected right is amply demonstrated by *Slochower v. Board of Higher Education*, 350 U.S. 551 (1957), a non-criminal case decided eight years before *Griffin*. In *Slochower*, a professor at Brooklyn College refused to answer questions before a legislative investigating committee regarding his political affiliations. Under the New York City Charter, any city employee who invoked his constitutional privilege against self-incrimination was summarily discharged. Exercise of the privilege constituted a resignation of employment. Speaking through Justice Clark, the Court found a violation of due process in the New York City provision which treated invocation of the constitutional privilege *per se* as the trigger of termination of employment.

The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. . . .

350 U.S. at 557-58. Likewise, the constitutionally protected right of interstate travel, which includes the right to reside in any state of the Union, would be a mockery if a state can presume conclusively the political ignorance or deviousness of those who exercise it.

The **Bar Admission Cases** offer another illustration of the limitations the Constitution imposes on creating civil and political disabilities because a constitutionally protected right has been exercised. In **Konigsberg v. State Bar of California**, 353 U.S. 252 (1957), (**Konigsberg I**), the Bar Committee for the State Bar of California denied petitioner admission to the California Bar on the ground that he had failed to prove that he was of good moral character. The basis for the Committee's finding was that petitioner refused to answer questions relating to his membership in the Communist Party. The Court found that this refusal was insufficient to support an inference of bad moral character, given the 42 uncontested statements in the record testifying to his good moral character. At most, the Committee could infer that petitioner was a member of the Communist Party, but this alone would not support an inference of bad moral character. In explaining this position, the Court noted that membership in the Communist Party had been lawful, and that those who joined it at that time "had a right to expect that the State would not penalize them, directly or indirectly, for doing so thereafter." 353 U.S. at 268. Political association is a constitutionally protected freedom under the first amendment, and exercise of this fundamental right could not serve as the sole basis for the adverse finding of bad moral character, absent an overriding state interest.

The recently decided **Bar Admission Cases** support the ongoing vitality of this principle of **Konigsberg I**. Concurring in **Baird v. State Bar of Arizona**, 91 S.Ct. 702,

707 (1971), Justice Stewart stated the governing constitutional principle:

It follows from these decisions that mere membership in an organization can never, by itself, be sufficient ground for a State's imposition of civil disabilities or criminal punishment. Such membership can be quite different from knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals.

Justice Harlan's separate opinion in *Baird*, while disagreeing with the assessment of the facts, agreed with this basic constitutional precept. If the state were denying applicants admission

solely by reason of their membership in so-called subversive organizations, irrespective of whether membership is born of a purely philosophical cast of mind or of a specific purpose to engage in illegal action; . . . I would be found on the "reversing" side of these cases. The records, however, . . . belie any such inferences.

91 S.Ct. at 745.

Justice Harlan's reading of the facts in *Baird* explains his dissent; similarly, factual interpretation explains his dissent in *Konigsberg I*. In *Konigsberg v. State Bar of California*, 266 U.S. 36 (1961) (*Konigsberg II*), the Bar Committee made explicit its ground for denying admission to petitioner—his refusal to answer questions relating to his membership in the Communist Party. In *Konigsberg I*, the Court had expressly noted that refusal to cooperate was not the basis for the Bar Committee's denial of admission, but from his reading of the record, Justice

Harlan felt that the Bar Committee's position could reasonably be interpreted as being based on petitioner's failure to cooperate. In **Konigsberg II**, the Bar Committee specifically found that denial of admission resulted from petitioner's unwillingness to answer questions about his alleged membership in the Communist Party. In that posture, the Court held that the case fell within the doctrine of **Beilan v. Board of Public Education**, 357 U.S. 399 (1958), decided subsequent to **Konigsberg I**. In **Beilan**, a public school teacher was discharged, after warning for "incompetence", because he refused to answer questions asked by the superintendent of schools about his membership in a Communist political association. The Court, split 5-4, held that petitioner's "incompetence", as that term was defined in a state statute, could be inferred by his refusal to provide information as to activities in certain allegedly subversive organizations.

By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher.

The question asked of petitioner by his Superintendent was relevant to the issue of petitioner's fitness and suitability to serve as a teacher. . . . The Board based its dismissal upon petitioner's refusal to answer any inquiry about his relevant activities—not upon those activities themselves. It took care to charge petitioner with incompetency, not with disloyalty. It found him insubordinate and lacking in frankness and candor

357 U.S. at 405-06. Following *Beilan*,² the Court in *Konigsberg II* found that the fourteenth amendment did not forbid a state from denying bar admission to an applicant who does not provide unprivileged answers to questions relevant to his qualifications to practice law. 366 U.S. at 44. Compare *Slochower*, *supra*, distinguished in *Beilan* and *Konigsberg II*.

From these cases, a constitutional principle can be inferred: a state may not impose a civil or political disability solely because a person has exercised a constitutionally protected right—i.e., a state may not penalize the exercise of fundamental constitutional rights absent an overriding interest. It may impose a duty of candor and frankness on prospective Bar applicants (*Konigsberg II*, *Law Students Civil Rights Research Council v. Wadmond*, 91 S.Ct. 720 (1971)), and public employees, *Beilan*, *supra*, but it may not draw adverse inferences on the basis of a person's exercising constitutionally protected rights, unless necessary to promote a compelling state interest. See

² It might be noted that Justice Black, dissenting in *Beilan*, rejected the majority's finding that refusal to cooperate in answering questions germane to one's qualifications for public employment was a permissible ground for dismissal: "I would allow no inference of wrongdoing to flow from the invocation of any constitutional right." 357 U.S. at 414 (Emphasis supplied). Justice Black goes on to note that government is being allowed to "penalize these citizens for their beliefs and associations." *Ibid.* Even under the majority's rationale, there can be no question that constitutionally protected activity cannot, of itself, trigger civil or political disabilities. The Court's decision rested squarely on a duty of cooperation, not on any inference from the exercise of a constitutionally protected right. Whether or not Justice Black's conclusion was warranted, the fact remains that under either opinion the durational residency requirement for voting is unconstitutional because, from the exercise of appellee's constitutionally protected right to move interstate, the State of Tennessee draws the conclusive inference that he is incapable of making intelligent use of the franchise and that he is likely to commit voter fraud. These inferences are unsupportable and constitutionally impermissible.

Slochower, *supra*. In the Bar Admission Cases, the principle has evolved that only knowing membership in an organization which advocates violent overthrow of the Government, with specific intent to further the illegal aims of the organization, constitutes a sufficient justification for exclusion from membership in the Bar.³ And the explanation for this principle is a delicate balance between the values of free political association and the historical suspicion of our political institutions—legislative, executive, and judicial—towards the Communist Party. In the case of durational residency requirements for voting, new residents are discriminated against solely because they have migrated to a new state. From this fact alone, they as a class are disqualified as electors on the dual assumption that they are likely to commit voting fraud, and/or they are unable to make intelligent use of the ballot. See Appellant's Brief at 10. Appellee made an attempt to show his competence to the Davidson County Election Commission, but the Commission ruled such a showing irrelevant under Tennessee constitutional and statutory law. If there were a procedure for ascertaining

³ This requirement that disabilities only be imposed if membership in an allegedly subversive organization which advocates violent overthrow of the government is knowing and there is a showing of specific intent to further the unlawful aims of the organization—can be taken as the requisite showing of a sufficiently compelling state interest. In *Sherbert v. Verner*, *supra*, the Court said that if the state regulation requiring applicants for unemployment compensation to be available for work Monday through Saturday could validly be applied to Mrs. Sherbert, a Seventh Day Adventist, the state must show either that there was no infringement on a constitutionally protected right (free exercise of religion), or that the state could justify the infringement by a compelling interest. As this Appendix has indicated, this is the same test articulated in footnote 21 of *Shapiro*. It is appellee's position that Justice Stewart's formulation of the governing constitutional rule in *Baird* can be understood in terms similar to the standards which were applied in *Sherbert* and should be applied in the instant case (as an interpretation of footnote 21 in *Shapiro*). What Justice Stewart's formulation means, then, is that disqualification from membership in the Bar on the basis of knowing mem-

the competence of new residents, and a newcomer refused to answer questions ruled germane to exercise of the franchise, perhaps an analogy to **Beilan** and **Konigsberg II** could be drawn. But in the instant case, the person who exercised his constitutional right of interstate travel specifically offered to make a showing of competence, and the responsible state election officials ruled such a demonstration immaterial. Cf. **Gardner v. Broderich**, 392 U.S. 273 (1968), *infra*. Clearly, the situation is much closer to **Slochower** than to **Beilan** or **Konigsberg II**. Appellee has been penalized solely because he is a member of a class whose very definition rests on the exercise of the right of interstate travel; unless the state can justify the voting disqualification as a restriction necessary to promote a compelling state interest, the classification must be invalidated.

Two further examples will conclude this Appendix. In **United States v. Jackson**, 390 U.S. 570 (1968), this Court invalidated the section of the federal kidnapping statute which provided the death penalty when imposed by a jury, but eliminated the death sentence for a defendant

bership with the requisite specific intent in an allegedly violent subversive organization is in fact a penalty on the exercise of a fundamental constitutional right—political association. But that the disability is justified because knowing membership in and an intent to further the illegal goals of a subversive organization constitute grave dangers to an orderly society. The classification on the basis of membership penalizes political association, triggering strict review. For this reason, the state does not carry its burden of justification by a mere showing of membership. This is not a sufficiently compelling interest to warrant imposition of a disability. The state can carry its burden, therefore, only when the danger reaches a higher level, to wit: knowing membership with specific intent to further the illegal goals. Only at that point is the danger sufficient to warrant the disability. Thus, the **Bar Admission Cases** lend support to appellee's interpretation of footnote 21 in **Shapiro**. Classification solely on the basis of exercising the right to enter and settle in any state triggers strict review, and imposes a burden on the state to show why the restriction is necessary to promote a compelling state interest.

who waived a jury trial. Speaking through Justice Stewart, the Court summarily dealt with the situation where a statute "had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them. . . ." 390 U.S. at 581. That, the Court stated, would be "patently unconstitutional." *Ibid.* Cf. **North Carolina v. Pearce**, 395 U.S. 711, 723-24 (1969). Justice Stewart went on to acknowledge that the section of the federal statute had another objective—avoiding the drastic alternative of mandatory capital punishment in every case. "In this sense, the selective death penalty procedure . . . may be viewed as ameliorating the severity of the more extreme punishment that Congress might have wished to provide." *Id.* at 581-82. The Court expressly ruled out motivation as the governing factor: "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive." *Id.* at 582. Thus, Congress could not impose such a penalty "in a manner that needlessly penalizes the assertion of a constitutional right." *Id.* at 583. Similarly, with respect to durational residency requirements for voting, the issue is not simply the motivation of the state legislature but whether the restriction imposed on new residents solely because they have recently traveled interstate is narrowly enough drawn so as to be necessary to promote a compelling state interest. As the District Court found, Tennessee's voter registration system adequately serves the function of protecting against voter fraud, and there is not one piece of evidence that the state has introduced to support its arm-chair philosophizing that new residents, as a class, are incapable of making intelligent use of the franchise. Indeed, what data that are available indicate just the opposite.

Brady v. United States, 397 U.S. 742 (1970), provides further insight into the Court's meaning in **Jackson**. In **Brady**, petitioner raised by habeas corpus a claim that his

guilty plea under the federal kidnapping statute was involuntary in light of **Jackson**. The Court rejected petitioner's claim, asserting that **Jackson** did not hold that all guilty pleas encouraged by the fear of a death sentence were involuntary; nor did **Jackson** mean that such guilty pleas are invalid whether involuntary or not. 397 U.S. at 747. **Brady** therefore means that a petitioner who was convicted under the federal kidnapping act prior to **Jackson** must still show independent elements of coercion if he is to win a new trial: "... a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty." 397 U.S. at 755.

Brady is not inconsistent with **Jackson**; it supports appellee's contention that the concern of the Court in cases of this kind has been to eliminate harmful results which flow directly from a person's invocation of constitutional rights. In **Slochower**, the **Bar Admission Cases**, **Harman v. Forssenius**, **Griffin v. California**, **Aptheker v. Secretary of State**, and **Jackson**, petitioners were seeking judicial protection from civil or political disabilities for the constitutional right they had exercised. In **Beilan** and **Konigsberg II**, petitioners were also seeking protection for exercising constitutionally protected rights, but the Court found that the interest of the state in examining the qualifications of its employees and members of the Bar imposed a duty of frankness and candor when questions relevant to their occupational ability were asked. The resulting disabilities were not caused by adverse inferences from the refusal to provide information, but from the very refusal to cooperate in furnishing relevant material on one's ability as an employee.⁴

⁴ As noted earlier, the analogy to durational residency would be the case where a new resident was asked questions relating to his competency as a qualified voter, and he refused to answer. Of course, just the opposite situation is involved here; appellee sought to furnish evidence of competence, but this was deemed irrelevant by the appropriate election officials.

The most difficult case to reconcile with **Brady** is not **Jackson** but **Garrity v. New Jersey**, 385 U.S. 493 (1967). In **Garrity**, policemen were subject to removal from office if they exercised their privilege against self-incrimination. Faced with this choice, the policemen decided to testify, and the evidence they furnished was subsequently used against them in a criminal prosecution. The Court refused to determine the constitutional validity of the job forfeiture provision, and held that it was only relevant in its implication for determining the voluntariness of the officer's statements. 385 U.S. at 496. Then, as to the choice between self-incrimination or job forfeiture, the Court said:

The choice to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.

385 U.S. at 497. The Court went on to hold that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office . . ." Id. at 500. Thus, in **Garrity**, the choice between loss of job and self-incrimination was sufficiently draconian that both as a matter of fact and law the resultant testimony was held to be coerced. **Brady** must then be read as finding that the choice imposed by the section of the federal kidnapping statute invalidated in **Jackson** did not as a matter of fact in the case then before the Court, or as a matter of law, inherently coerce a plea of guilty. Analyzed in this way, **Garrity** becomes strictly a criminal procedure case, the determinative question being the voluntariness of the "confessions". This reading removes the inconsistency that in **Garrity** alone the petitioner was not penalized for exercising a constitutional right. What happened in **Garrity** was that petitioner was intimidated, gave up his right to remain silent, and then sought judicial relief on the ground that his admissions

were not truly voluntary. Thus, the **Garrity** analysis is not really helpful in application to the durational residency situation.

But while **Garrity** is not useful, two subsequent cases which relied in part on the reasoning in **Garrity** have a direct bearing. **Gardner v. Broderick**, 392 U.S. 273 (1968), and **Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation**, 392 U.S. 280 (1968), involved the situation alluded to in **Garrity** but not decided: "whether a State may discharge an officer for refusing to waive a right [privilege against self-incrimination] which the Constitution guarantees to him." **Gardner v. Broderick**, *supra*, at 274. In **Gardner**, a policeman was subpoenaed to testify before a grand jury investigating bribery and corruption of police; he refused to testify, invoking the privilege against self-incrimination. Under a New York City Charter provision, the policeman was dismissed for his refusal to sign a waiver of his fifth amendment privilege. So the question squarely presented was "whether a policeman who refuses to waive the protections which the privilege gives him may be dismissed from office because of that refusal." 392 U.S. at 273. In **Uniformed Sanitation Men Ass'n**, the same New York City Charter provision was involved in its application to sanitation department employees who refused to testify in an investigation of kickbacks in the department. In both cases (decided the same day), the Court allowed for the exception carved out in **Beilan** and **Konigsberg II**, but found the facts of the case more akin to those in **Slochower**:

If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, . . . the privilege against self-

incrimination would not have been a bar to his dismissal.

The facts of this case, however, do not present this issue . . . He was discharged from office, not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right.

. . . He was dismissed solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege.

Gardner v. Broderick, 392 U.S. at 278. And see **Uniformed Sanitation Men Ass'n**, 392 U.S. at 284: "But here the precise and plain impact of the proceedings . . . was to present them with a choice between surrendering their constitutional rights or their jobs."

The relevance of **Gardner** and **Uniformed Sanitation Men Ass'n** to the voter waiting period situation is direct. They reaffirm the position of appellee that the primary concern of the Court has been protecting those persons who exercise basic constitutional guarantees (like the right of interstate travel) from facing political or civil disabilities or restrictions solely because they exercised their fundamental rights. Thus, penalty and deterrence are not synonymous. And from this review of cases, it is apparent that footnote 21 in **Shapiro** must mean that strict equal protection scrutiny is triggered when a disadvantage is imposed on a class solely because it has exercised a constitutionally protected right, be it free exercise of religion, freedom of association, freedom of speech, privilege against self-incrimination, right to be free from poll taxes, right to jury trial, or right of interstate travel. Of course, this does not conclude the equal protection analysis since the state may justify the restriction, but it must show that the limitation is necessary to promote a compelling state interest.

